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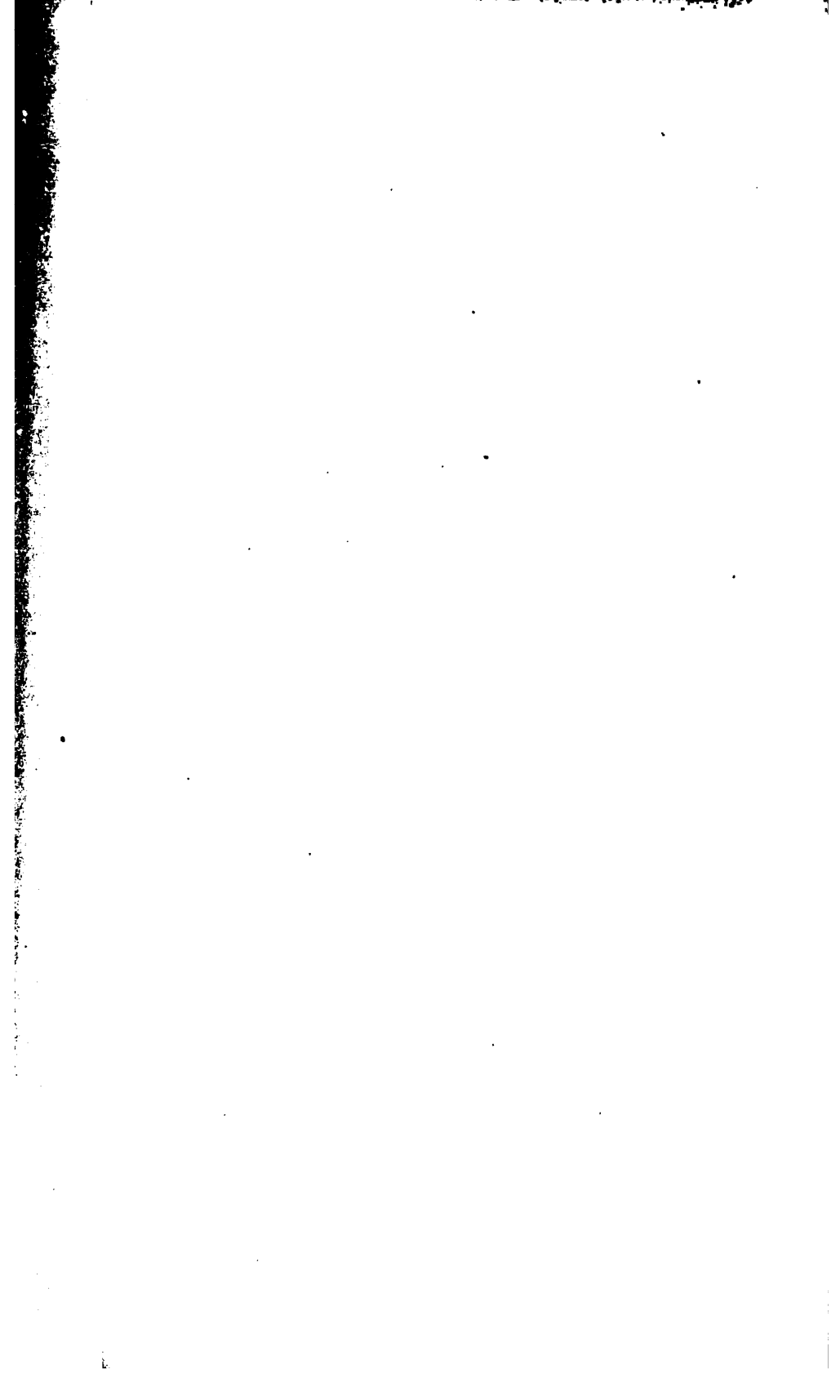
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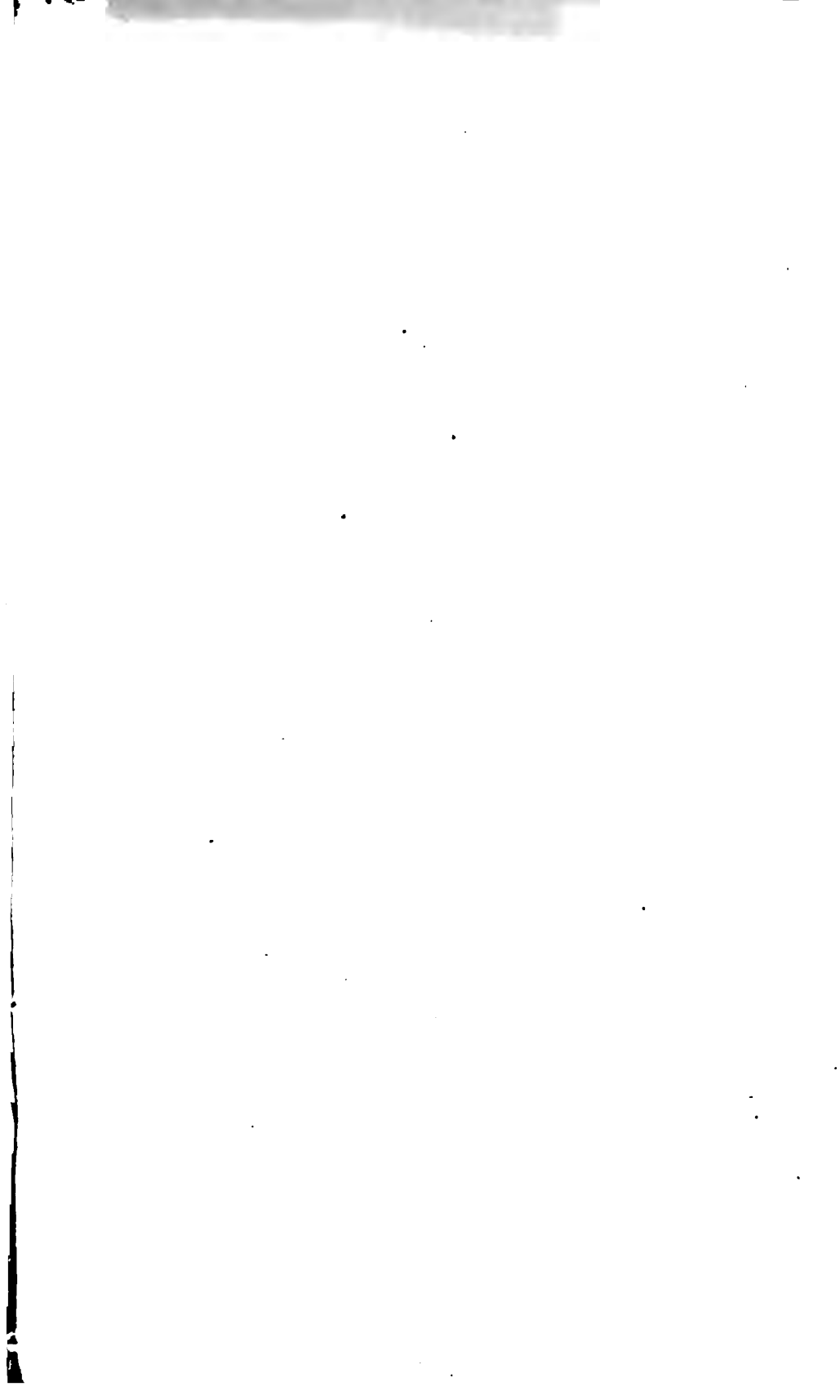


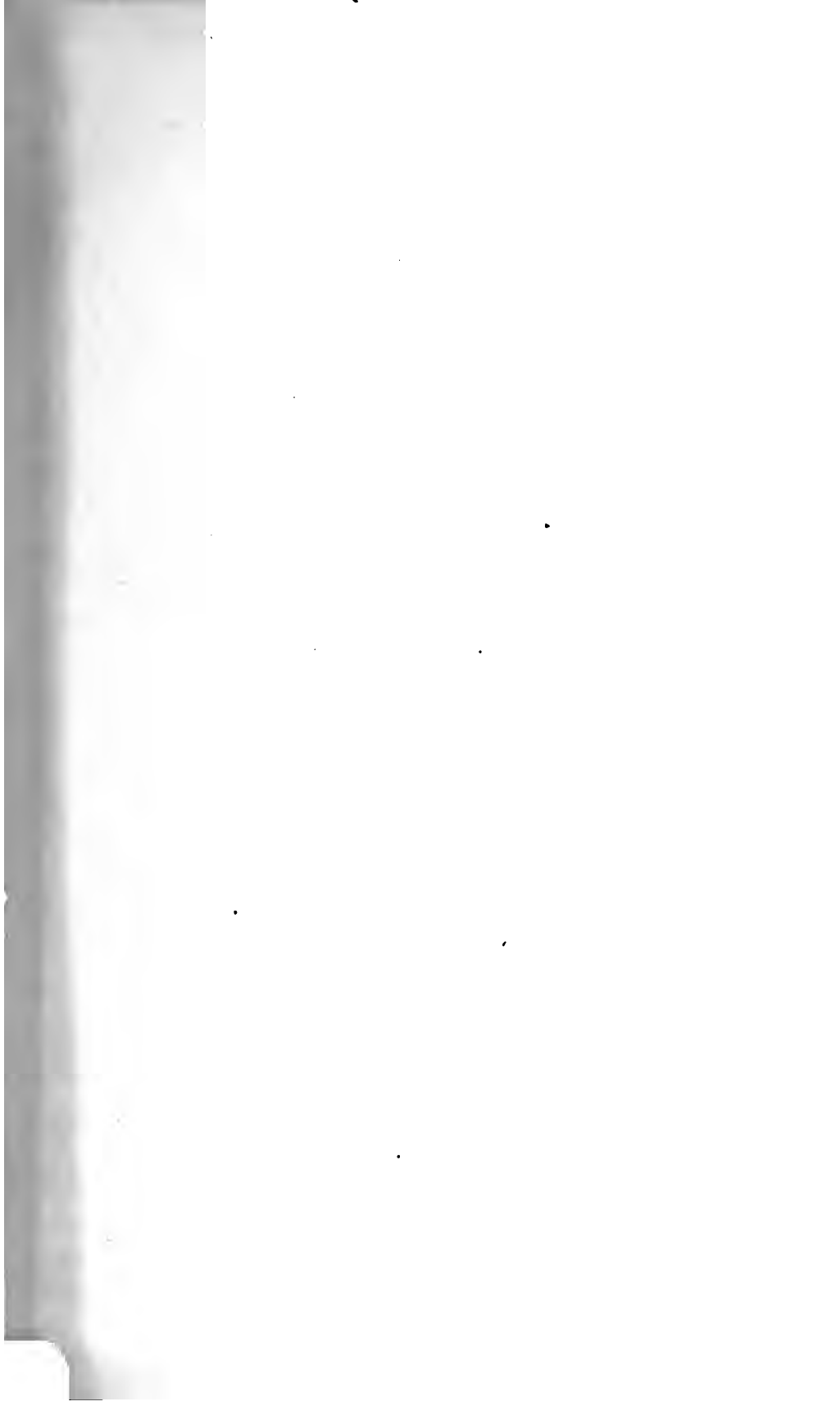




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VOL. IX.

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THE PEOPLE, ETC., Appellants,

v.

NEW YORK CENTRAL AND HUDSON R. R. Co. Respondents;

THE PEOPLE, ETC.,

v.

NEW YORK, LAKE ERIE AND WESTERN R. R. Co.

(*Advance Case, N. Y. Supreme Court. General Term, 1882.*)

Railroads, as public highways, created for public use, and subject to State jurisdiction, are handed over exclusively to corporate management and control, because it is for the best interests of the public that their functions should be performed for the State, as public trusts by corporate bodies; and the acceptance of such trusts on the part of the corporation makes it the agency of the State, whereby it contracts to accept the duty of carrying all persons and property, within the scope of its charter, as a public trust. The exclusive enjoyment of use to the corporation imposes the corporate duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as the public needs may require.

The performance of such duty is compellable on behalf of the people, through the Courts, by mandamus; and their Attorney-General is the proper officer to set the process in motion. The fact that injured individuals may have private remedies for damages sustained does not preclude the State from its remedy by mandamus, where there is a general or partial suspension of the duty of receiving or transporting freight affecting large numbers of people.

Uncontroverted allegation, showing a quite general and largely injurious refusal and neglect of performance of the duties of carrier by a railroad company establishes a case for the interference of the State; and railroad corporations cannot refuse or neglect to perform their public duties pending a controversy with their employees over the cost and expense of doing them, where it does not appear that the employees committed any unlawful act, or that there was an illegal combination compelling them to stop working.

The writ should simply require the corporation to resume the duties of carrier of the goods and property offered for transportation, and upon its return all questions, whether what had been done was a sufficient compliance with its command, would become a subject of further consideration.

Appeals from orders of the Special Term, granting motions to quash and dismiss the petition and order to show cause of the appellants, and denying the application of the appellants for peremptory writ of mandamus.

Leslie W. Russell, E. C. James, S. Sterne and D. I. Thompson, for appellants. W. D. Shipman and Roscoe Conkling for respondent.

DAVIS, P. J. The appellants, upon the petition of the Attorney-General and affidavits accompanying the same, obtained orders from one of the Justices of this Court requiring the respondents, respec-

tively to show cause, upon service of less than eight days, at a Special Term sitting at Chambers, why a peremptory writ of mandamus should not issue commanding the respondents respectively to forthwith resume the discharge of their duties as common carriers and the exercise of their franchises, by promptly receiving, transferring and delivering all such freight or other property as may be offered to or heretofore received by them for transportation at their stations in and to the City of New York, upon the usual and reasonable terms of charge.

Upon an adjourned day for the hearing of the motion, the respondents appeared by counsel and objected that the moving papers failed to show any grounds for the relief prayed for, and moved to "quash and dismiss said petitions and orders to show cause." The Court entertained this motion, and, against the objection of the appellants, awarded the right to open and close the argument on the hearing to the counsel for the respondents; and, after hearing the respective counsel, the Court orders as follows: "That the said preliminary objection be and the same is hereby sustained, and the motion to quash and dismiss the said petition and order to show cause be and the same is hereby granted and the said application of said petitioner denied."

It is now objected that this mode of disposing of the motions was so far irregular as to render the order erroneous. It certainly was an unusual mode of proceeding. The motions came to the Special Term precisely as though upon an ordinary notice. The order of the Judge simply limited the time of notice, and when the respondents appeared in answer to the notice, if they were willing to come to a hearing upon the petition and affidavits, the usual and proper course was to proceed to a hearing of the motions upon those papers, the moving party holding the affirmative and being entitled to the right to open the close. A notice to quash a motion is a novel proceeding. Motions to quash usually apply to existing writ or process, and not to mere attempts to obtain them. The Court doubtless regarded the action of the respondent's counsel as in the nature of a demurrer *ore tenus* to the petition and affidavits on the part of the appellants. Where an alternative writ has been granted the defendant may move to quash or set the same aside. *People ex rel. v. Judges, etc., of Westchester, 4 Cow. 73.*

And such a motion is in the nature of a demurrer (*Poeple v. College of Physicians, 7 How. Pr. 290*), and should be made the return to the writ, unless the motion to quash is based upon a defect in substance, in which case it may be taken advantage of any time before a peremptory mandamus is awarded. *Commercial Bank v. Canal Commissioners, 10 Wend. 31; The People v. Ransom, 2 N. Y. 492.*

Of course upon such a motion, the moving party holds the affirmative. But that was not this case. In this case no alternative writ

having been issued, there was nothing to quash, and the objection was simply an assertion that the appellants were not, upon their own showing, entitled to have the motion granted, and such assertion did not change the rights of the respective parties as to the order of proceeding on the hearing. The Court of Appeals have held that the according of the affirmative to the wrong party on a trial before a jury, is an error fatal to the judgment. But on motions at Special Term, it is not very material which party opens or closes; and this Court on review will only inquire into the correctness of the decision, where the order denies or grants the motion. In this case although the order directs that the petition and proceedings be quashed, yet the motion for the mandamus was also denied, and both the denial and the order to quash were based upon the merits of the motion. The right of appeal was not affected, and we think it is our duty to hear and dispose of the appeal upon the merits. The practice at the Special Term should, however, be discountenanced as a precedent.

The question presented by the motion is one of signal importance. It is whether the people of the State can invoke the power of the Courts to compel the exercise by railroad corporations of the most useful public functions with which they are clothed. If the people have that right, there can be no doubt that their Attorney-General is the proper officer to set it in effective operation on their behalf. 1 R. S. 179, sec. 1; Code of Civil Procedure, sec. 1993; *People v. Halsey*, 37 N. Y. 344; *People v. Collins*, 19 Wend. 56. The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred and the duties imposed upon them by the laws of their creation and of the State. As bodies corporate, their ownership may be and usually is altogether private, belonging to the holders of their capital stock, and their management may be vested in such officers or agents as the stockholders and directors, under the provisions of law, may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantage of the corporators. But these conditions are in no just sense in conflict with their obligations and duties to the public. The objects of their creation are from their very nature largely different from those of ordinary private and trading corporations. Railroads are in every essential quality public highways, created for public use, but permitted to be owned, controlled and managed by private persons. But for this quality the railroads of the respondent could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain which belongs to the State in its corporate capacity alone, and cannot be conferred except upon a "public use."

The State has no power to grant the right of eminent domain to

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any corporation or person for other than a public use. Every attempt to go beyond that is void by the Constitution, and, although the Legislature may determine what is a necessary public use, it cannot by any sort of enactment divest of that character any portion of the right of eminent domain which it may confer. This characteristic of "public use" is in no sense lost or diminished by the fact that the use of the railroad by the corporation which constructs or owns it must from its nature be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public. The general and popular use of a railroad as a highway is therefore handed over exclusively to corporate management and control, because that is for the best and manifest advantage of the public. The progress of science and skill has shown that highways may be created for public use of such form and kind that the best and most advantageous enjoyment by the public can only be secured through the ownership, management and control of corporate bodies created for that purpose, and the people of the State are not restricted from availing themselves of the best modes for the carriage of their persons and property. There is nothing in the Constitution hostile to the adoption and use by the State of any and every newly developed form or kind of travel and traffic which have a public use for their end and aim, and giving to them vital activity by the use of the power of eminent domain.

When the earliest Constitution of our State was adopted railroads were unknown. The public highways of the State were its turnpikes, ordinary roads and navigable waters. The exercise of eminent domain in respect of them was permitted by the Constitution for the same reasons that adapt it now to the greatly improved methods of travel and transportation; and in making this adaptation there is no enlarged sense given to the language of the Constitution, so long as its inherent purpose—the creation only of public uses—be faithfully observed.

These principles are abundantly sustained by authority. In *Bloodgood v. The Mohawk and Hudson R. R. Co.*, 18 Wend. 9, the Court of last resort in this State first announced them and affixed to railroads their true character as public highways. It is there declared that the fact that railroad corporations may remunerate themselves by tolls and fares "does not destroy the public nature of a road, nor convert it from a public to a private use. . . . If it is a public franchise, and granted to the company for the purpose of providing a mode of public conveyance, the company, in accepting it, engages on its part to use it in such manner as will accomplish the object for which the Legislature designed it." And in *Olcott v. The Supervisors* (16 Wall. 678), the Supreme Court of the United States adjudged "that railroads, though constructed by private corporations, and owned by them, are public highways,

has been the doctrine of nearly all the Courts ever since such conveniences for passage and transportation have had any existence. Very early the question was whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a State Legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the Government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motor power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the Legislature is the exclusive judge."

All public highways are subjects of general State jurisdiction, because their uses are the common property of the public. This principle of the common law is, in this State, of universal application. As to the class of public highways known as railroads, the common law is fortified by the express conditions of the statutes creating or regulating or controlling them.

The general railroad act of this State may now be regarded as the general charter of all such corporations. It authorizes the organization of corporations for "the constructing, maintaining and operating" of railroads "for public use," and imposes upon them the duty to "furnish accommodations for all passengers and property, and to transport all persons and property on payment of fare or freight." Laws of 1850, chap. 10, sec. 1 and sec. 33.

These words are a brief summary in respect of the duties imposed upon such corporations by all the provisions of the act. Those duties are consigned to them as public trusts, and as was said by the Court in *Messenger v. Penna. R. R. Co.*, 36 N. J. 407, "although in the hands of a private corporation, they are still sovereign franchises.

and must be used and treated as such; they must be held in trust for the public good." This relation of such a corporation to the State is forcibly expressed by Emmons, J., in *Talcott v. Township of Pine Grove*. 1 Flipper, U. S. Circuit Court Reps. 144. "The road once constructed is, instantaneously, and by mere force of the grant and law, embodied in the governmental agencies of the State, and dedicated to public use. All and singular its cars, engines, rights of way and property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office. The artificial personage—the corporation created by the sovereign power expressly for this sole purpose and no other—is, in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice."

The acceptance of such trusts on the part of a corporation by the express and implied contracts already referred to, makes it an agency of the State to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of public highways are so devolved, and the performance of every official duty in respect of them may be compelled by the Courts on application of the State, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations in regard to their relations to the State is strong and clear, and so far as affects the construction and proper and efficient maintenance of their railroad, will be questioned by no one. It is equally clear, we think, in regard to their duty as carriers of persons and property. This springs sharply out of the exclusive nature of their right to do these things. On other public highways, every person may be his own carrier, or he may hire whomsoever he will to do that service. Between him and such employee a special and personal relation exists independent of any public duty, and in which the State has no interest. In such a case the carrier has not contracted with the State to assume the duty as a public trust, nor taken power to do it from the State by becoming the special donee and depository of a trust. A good reason may therefore be assigned why the State will not by mandamus enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate which alone has power to use it, in a manner which of necessity requires that all management, control and uses, for the purposes of carriage, must be limited to itself, and which, as a condition of the franchise that grants such absolute and exclusive power over the use of a public highway, has contracted with the State to accept the duty of carrying all persons and property within the scope of its charter as a public trust. The relation of the State to such a body is entirely

different from that which it bears to the individual users of a common highway, as between whom and the State no relation of trust exists, and there is small reason for seeking analogies between them.

It is the duty of the State to make and maintain public highways. That duty it performs by a scheme of laws which set in operation the functions of its political divisions into counties, towns and other municipalities, and their officers. It can and does enforce those duties whenever necessary through its courts. It is not the duty of the State to be or become a common carrier upon its public highways; but it may in some cases assume that duty, and whenever it lawfully does so, the execution of the duty may be enforced against the agents or officers upon whom the law devolves it. It may grant its power to construct a public highway to a corporation or an individual, and with that power, its right of eminent domain in order to secure the public use; and may make the traffic of the highway common to all on such terms as it may impose. In such case it is its duty to secure that common traffic, when refused, by the authority of its courts. 19 Wend. 56; 1 Cow. 23. Or it may grant the same powers of construction and maintenance with the exclusive enjoyment of use, which the manner of use requires, and if that excludes all common travel and transportation, it may impose on the corporation or person the duty to furnish every requisite facility for carrying passengers and freight and to carry both in such manner and at such times as public needs may require. Why is that duty in respect of the power to compel its performance through the courts, not in the category of all others entrusted to such a body?

The writ of mandamus has been awarded to compel a company to operate its railroad as one continuous line (*Railroad Co. v. Hall*, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (*State v. Railroad Co.*, 29 Conn. 538); to compel it to construct and maintain fences and cattle guards (*People v. Railroad Co.*, 14 Hun, 371; 76 N. Y. 284); to compel it to build a bridge (*People v. Railroad Co.*, 70 N. Y. 569; to compel it to construct its road across streams so as not to interfere with navigation (*State v. Railroad Co.*, 9 Richardson, 247); to compel the company to run daily trains (*Re New Brunswick and Canada R. R. Co.*, 1 P. & B., New Brunswick, 67); to compel the delivery of grain at a particular elevator (*Railroad Co. v. People*, 56 Ill. 365); to compel the completion of its road (*Trust Co. v. Railroad Co.*, 17 Am. Reg. 266); to compel the grading of its track so as to make crossings convenient and useful (58 N. Y. 152; 12 H. 175; 71 N. Y. 302; *Indianapolis R. Co. v. The State*, 37 Ind. 486; 35 N. J. L. 396); to compel the re-establishment of an abandoned station (*State v. Railroad Co.*, 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (*King v. Railway Co.*,

2 Barn. & Adol. 644); to prevent the abandonment of a road once completed (*Talcott v. Pine Grove*, supra, 1 Flipper, 145); and to compel a company to exercise its franchise (*People v. A. V. R. R. Co.*, 24 N. Y. 261). These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is indeed the ultima ratio of their existence, the great and sole public good, for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to compel the doing of the thing itself.

We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers, and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit, and also upon the contract between the corporation and the State expressed in its charter or implied by the acceptance of the franchise (*Abbott v. Johnson, R. R. Co.*, 80 N. Y. 31), and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed by the Legislature, for adequate reasons, in this special instance, into a corporate franchise to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by its trustee.

But it is said that the State is not injured and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the State in either case. The sovereignty of the State is injured whenever any public function vested by it in any person, natural or artificial, for the public good is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State and thereby, in a legal sense, injures the entire body politic.

The State in such a case as this has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations have neglected public duties (*People v. Fishkill R. R. Co.*, 27 Barb. 452, 453; *People v. H. & C. Turnpike Co.*, 23 Wend. 254; *Turnpike Co. v. State*, 3 Wall.

210; *People v. K. & N. Turnpike Co.*, 23 Wend. 208; *People v. B. & B. Turnpike Co.*, id., 222; *C. R. Bridge Co. v. Warren Bridge*, 7 Pickering, 344; but that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue. *State v. Railroad Co.*, 29 Conn. 538; *People v. Railroad Co.*, 24 N. Y. 261; *Talcott v. Pine Grove*, *supra*.

Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the Court to judge whether the elected remedy should be applied. But upon the question of power and of sufficient legal injury to justify its use where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt.

Nor do we think the fact that injured individuals may have private remedies for the damages they may have sustained by neglect of duties, precludes the State from its remedy by mandamus. Where the injury is to a single person under circumstances which do not affect the general public, the Courts in the exercise of their discretion have properly refused this remedy on his relation. He has an adequate remedy by private action for damages. That was the case of *Ohlen v. Erie R. R. Co.* (22 Hun. 533), relied upon by the Court below as establishing that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the Attorney-General for a neglect or refusal by corporations to exercise their franchise to an extent which affects great numbers of citizens and continues to for a considerable period of time; nor does it deny the right of the people acting on their own behalf and in their own suit, to pursue the remedy in any case of neglect or refusal to exercise a public function which the interests of the people require should be kept in vigorous and efficient use. The Court in that case recognizes the distinction when it says "An exception exists. . . where a corporation suspends the exercise of its functions." The suspension of the exercise of corporate functions is the gravamen of the complaint in this case, and the case cited is no authority for denying the writ when the people come into Court with their own suit by their Attorney-General to move for a writ of mandamus on allegations of an alleged long continued and very general suspension of a corporate duty.

It was supposed by the Court below that the provisions of section 28 of the act of 1850, as amended by chapter 133 of the Laws of 1880, which provide that railroad corporations shall have power "to regulate the time and manner in which passengers and property shall be transported," interfere in some way with the power to grant the writ. Undoubtedly it gives the discretion which the

learned Judge states, but it cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. Language of that kind in a similar act was correctly construed by Dickerson, J., in the *Railroad Owners v. Portland and Oxford R. R. Co.*, 63 Maine, 269. We adopt but have not room to quote his language.

Having determined the question of the right of the State to prosecute the writ of mandamus on the ground of refusal or neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ, was presented. The case stands altogether upon the facts presented by the appellants. The course taken by the respondents must be regarded as an admission of the material facts contained in the petition and affidavits.

The petition alleges that the said railroad company, since about the 16th day of June, 1882, has substantially refused to discharge its duties as a common carrier, and has to a material degree suspended the exercise of its franchises by refusing to take freight which has been offered at its stations in the City of New York for transportation, at the usual rates and upon the usual terms, and that said railroad company has refused to accept and transport the greater part of the outgoing and to deliver the incoming freight and property of the merchants doing business in the City of New York, who have relations with and need for the service of such railway, and has refused to them to furnish adequate transportation for the same, so that from the date aforesaid until the present date the business community of the City of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation; but the said railroad has uniformly delayed, and sometimes peremptorily refused, to receive and deliver freight and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damage accrued to the people of the State of New York, for which there is no adequate remedy in damages, and that the trade and commerce of said city is greatly injured by the action of the said railroad.

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations; but it is not important to examine them minutely, because the admission of a demurrer ore tenus extends to and limits the well pleaded averments of the petition. Stated very briefly, the affidavits show that for about two weeks the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city, and in many instances refused to receive goods

offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shipper to pay charges, but was wholly the act of respondents; that it was so continued and and extensive that it seriously interfered with the business operations of the citizens of New York, deteriorated the value of many commodities and caused a diversion of trade from the city and great losses were caused, and especially that large quantities of perishable goods by reason of non-delivery were destroyed, to the value of many thousand dollars; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than \$50,000, while the aggregate of injuries are estimated at some millions. These are the substantial facts conceded by respondents at the Special Term. Surely it cannot be doubted that these facts being true and unexcused showed a strong case for the interference of the State.

The only question is whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the Court was justified in denying the motion for the writ on its own merits, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons assigned by the respondents for their refusal to accept, transport and deliver the freight and property. In the petition it is stated in these words: "That the persons in their employ handling such freight refused to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight-handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour (or two dollars per day of ten hours) was paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterward employed, caused the neglect and refusal complained of.

It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appears. It is urged, in effect, that the Court should regard the cases as one of unlawful duress caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statement

of the case, a body of laborers acting in concert fixed a price for their labor and refused to work at a less price. The respondents fixed a price for the same labor and refused to pay more. In doing this neither did an act violative of any law or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid and adhere to it if they chose, but if the consequence of their doing so were an inability to exercise their corporate franchise to the great injury of the public they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents in resisting such unlawful efforts had refused to obey unjust and illegal dictation and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the Court, as well as of the Attorney-General, would have been presented. Whether such a state of facts could have been shown we cannot judicially know. The present case must stand or fall upon the papers before us, and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case, which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is that the skilled freight-handlers of the respondents refused to work without an increase of wages, to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work and that the respondents did not procure other laborers competent or sufficient in number to do the work. And so, the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus.

These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and

duties in regard to other public highways, can do without subjecting himself to mandamus or indictment

We are not able to perceive the difficulties that embarrassed the Court below as to the form of a writ of mandamus in such case. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation. That is, to receive, carry and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kinds of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ, on their own behalf, and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions whether what has been done is a sufficient compliance with its command may properly arise and become a subject of further consideration. They need not have been anticipated.

It is suggested that the time has now passed when such a writ can be of any valuable effect. That is probably so, but we are governed by the record in disposing of the appeal, and not by subsequently occurring events. The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous they are entitled to have that judgment reversed, and to be indemnified in the discretion of the Court for the costs incurred on the appeal made necessary by the error.

We think the Court below had power to award the writ, and that upon the case presented, it was error to refuse it.

The order should be reversed with the usual costs, and an order entered, if deemed advisable from any existing circumstances by the Attorney-General, awarding the writ.

Although the above opinion was rendered only by the General Term, and is therefore subject to reversal, we have thought it best, on account of the great interest and importance of the question involved, to present it at once to our readers. The exhaustive nature of the opinion and the elaborate citation of authorities therein contained render it unnecessary for us to do more in this note than to indicate the cases which turn upon the same question.

Where a railroad is under military control of the government, and is not in the free and unrestrained exercise of its franchise, it is not bound to receive freight for transportation, and is not liable to an action for a failure to do so.

Illinois Central R. R. Co. v. McClellan, 54 Ill. 48; Illinois Central R. R. Co. v. Ashmead, 58 Ill. 487; Illinois Central R. R. Co. v. Cobb, Christy & Co., 64 Ill. 128; Illinois Central R. R. Co. v. Homberger, 77 Ill. 457.

But where it has accepted goods while under such control, it is not exempt from liability to forward them. Phelps v. Illinois Central R. R. Co., 94 Ill. 548; S. C., 4 Ill. App. 288.

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Several cases have also arisen, involving the liability of a company for a failure to receive or transport goods in consequence of a strike. The general doctrine of most cases seems to be substantially that laid down in the principal case.

In *Blackstock v. New York and Erie R. R. Co.*, 20 N. Y. 48, certain goods in transit were delayed by a sudden abandonment of work by all of the engineers on the road, in consequence of the passage of a certain reasonable regulation by the company as to their duties. The company was nevertheless held liable. The doctrine seems to have been that the company had a right to adopt the regulation, but must do so at its peril; and if, in consequence, it was incapacitated from performing its duty as a carrier, it must abide the consequences.

Cf. *Condert v. Grand Trunk R. Co.*, 54 N. Y. 500.

In Illinois it has been decided (three judges out of seven dissenting) that, where goods are delayed in transitu by the violence and threats of a mob, composed of discharged employees, the company will not be responsible, at least where it has promptly filled the vacancies caused by the dismissals. Upon this point the court in *Pittsburg, Ft. Wayne and Chicago R. R. Co. v. Hazen*, 84 Ill. 36, said: "It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier cannot promptly supply their places with other employees, and injury results from the delay, the carrier is responsible. Such delay results from the fault of the employees. The evidence offered in this case, however, tended to prove that the delay was not the result of a want of suitable employees to conduct the trains, for the places of the 'strikers' were, according to the proof offered, promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employees of the company. The case supposed is not distinguishable in principle from the assault of a mob of strangers."

In Indiana the court has not gone quite so far. In *Pittsburg, Cinn. and St. L. R. R. Co. v. Hollowell*, 65 Ind. 188, it was decided that the failure of a common carrier to receive and transport goods was excused where an armed mob, defying at once the power of the company and the civil authorities, had seized the stations and rolling stock, and prevented the forwarding of freight. The rules of the common law in reference to the liability of common carriers were cited by the appellee, and sought to be applied, it being contended that, as a mob did not amount to a public enemy, the company was clearly liable.

The court answered that argument after this manner:

"The strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation, and fail to deliver them at their destination, or when they are lost. In cases like the present for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rules of liability for a breach of his contract, or of his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob."

It was further decided, in the above case, that the mere fact that the mob had been caused by a reduction of the rate of wages paid by the company to its employees, did not render the company liable.

"The fact that a railroad company has reduced the wages of its employees

cannot be held to justify or excuse a mob composed of indiscriminate persons in stopping a train of cars, and delaying the receiving of goods or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings when they cause such delay."

The reader is further referred in this connection to *Seligman v. Armigo*, 1 New Mex. 459, where the fact that certain goods were destroyed en route by a force of United States soldiers duly officered, was held not to exempt the carrier from liability, the strict rule of the common law being applied.

The subject was not fairly considered in *Sherman, Hall & Co. v. Penn. R. R. Co.*, 8 Am. and Eng. R. R. Cas. 274; but it was intimated that the act of a lawless mob would not protect defendant against its failure to fulfil the obligations of a common carrier.

The law of the subject involved in the principal case may in view of the authorities above reviewed be considered as very doubtful. We must be permitted to express the opinion, however, that the strong drift of the cases seems to be away from the strict rules of the old common law.

DETROIT AND BAY CITY RY. CO.

v.

JAMES McKENZIE.

(43 *Michigan Reports*, 609.)

A railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect.

But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess.

In an action to recover such excess, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance, is immaterial.

In an action against a carrier, when unreasonable delay is complained of, and the loss of a market is claimed, it is not sufficient for the plaintiff to prove delay, and also a damage, when it appears from his proofs that there was other delay not chargeable to the defendant; but some damage must be traced to the delay for which the defendant was in fault.

When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration.

ERROR to Lapeer. Submitted April 9. Decided June 11.

Assumpsit. Defendant brings error.

J. B. Moore and G. V. N. Lothrop for plaintiff in error. As to the carrier's freedom from obligation to do more than deliver goods at the destination marked on them, unless there are special directions, cited *Wibert v. N. Y. and Erie R. R.*, 12 N. Y. 245; *Nutting v. Conn. R. R. R.*, 1 Gray, 502; *Jenneson v. C. and A. R. R.*, 4 Am. L. Reg. 284.

W. W. and M. N. Stickney and Wm. T. Mitchell for defendant in error.

COOLEY, J.—In this action McKenzie recovered damages of the railroad company in respect to three several consignments of spars or masts, transported for him over its road. Different questions arise upon the record in respect to each of them, and they will therefore be considered separately.

I. The first consignment was of 12 cars of masts or spars from Fish Lake station, for which receipts were given of the following form:

"Detroit and Bay City R. R. Co. Fish Lake Station, August 12, 1873. Received from Jas. McKenzie, in apparent good order, two cars spars, 4612, 6206, marked Jas. McKenzie, Yarmouth Junction, Maine. Rate paid per car, Fish Lake to Port Huron, \$22 per car. Marked and described as above; contents and value otherwise unknown; for transportation by the Detroit and Bay City R. R. Co. to their warehouse at ———.

"Notice. See rules of transportation on back hereof.

"[Signed]

J. KERN, Agent."

Among the rules endorsed on the back was the following:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond its terminus, will be sent forward by a carrier or freightman, when there is such, in the usual manner, the company acting for the purpose of delivery to such carrier as the agents of the consignor or consignee, and not as carriers. This company will not be responsible for any loss or damage to the property after the same shall have been sent from any warehouse of the company."

It is alleged by McKenzie in the first count of his declaration that the railroad company undertook to transport these twelve cars of masts or spars from Fish Lake station to Port Huron for the price of \$22 per car, but that on their arrival at Port Huron the company demanded and exacted \$45 per car. The questions that arise on this count are, first, whether the contract of the company was a contract to carry to Port Huron; and second, whether there is evidence that the company exacted and received the excessive charges.

Port Huron is not a station on the Detroit and Bay City Railroad, but is the connecting point of the Port Huron and Chicago with the Grand Trunk Railway. The Port Huron and Chicago Railway crosses the Detroit and Bay City Railroad at Lapeer, and the line of transportation for these cars would be by the Detroit and Bay City road to Lapeer, and by the Port Huron and Chicago road to Port Huron. The defendant contended in the court below that its obligation was only to transport the cars over its own road and deliver them to the connecting road at the point of intersec-

tion, and that consequently the undertaking of the defendant was incorrectly set out in the declaration. This is probably true. *Gass v. New York, etc., R. R. Co.*, 99 Mass. 220; *Schneider v. Evans*, 25 Wis. 241; *Cincinnati, etc., R. R. Co. v. Pontius*, 19 Ohio St. 221. But this is an immaterial variance. The gist of the action is that the defendant undertook that the price for the carriage should be a certain sum, but that when the carriage was completed a larger sum was exacted. It is of no importance that the declaration fails to state that the carriage for a portion of the distance was to be by a connecting road, or that it alleges something different.

The evidence of the payment of the excessive charge is that of the agent of the Grand Trunk Railway at Port Huron, that he paid \$505 as freight charges to that point, by giving credit on the books of his company to the Port Huron and Chicago R. R. Co. in the usual course. This, in connection with evidence that defendant made the Port Huron and Chicago R. R. Co. its agent for the purpose of collecting and receiving its charges when property was sent subject to them was sufficient. The plaintiff had a right to look to the defendant for the whole excess, whether received by itself or by another company. *Schneider v. Evans*, 25 Wis. 241.

II. The second consignment was of large masts which the plaintiff claims were to be carried from Lapeer to Detroit over the road of the defendant for \$300, but for the carriage of which the defendant demanded and received \$700. He also alleges "that the defendant did not nor would deliver said spars or masts at Detroit aforesaid in a reasonable time after so undertaking to do; but so negligently and wrongfully delayed the transportation and delivery of the same that said plaintiff lost the sale of the same."

These masts, it appears, were to be and were delivered by defendant to the Canada Southern R. R. Co. to be transported to the seaboard in Maine. If defendant agreed to transport them over its road for \$300, there is no evidence in the record that any larger sum was ever paid to or received for it. There was serious difficulty in the transportation; some breaking down of cars and some reloading; and the superintendent of the road testified that plaintiff agreed to pay \$500, besides certain charges for assistance and repairs; and it might be inferred that all of these were included in back charges afterwards paid to the Canada Southern by a company receiving the masts at Buffalo. But this would be inferred only from the fact that it is testified that the payment was agreed upon by the plaintiff; and if it was he is entitled to have none of it refunded. *Moore v. Detroit Locomotive Works*, 14 Mich. 266.

That the transportation of the masts from Lapeer to Detroit was seriously delayed appears in the evidence, and the causes are stated. But there is no showing that plaintiff lost a sale in consequence, or indeed that he had ever negotiated a sale. Some wit-

nesses testify to a depreciation in the market value of such timber between the time when the masts should have been received at the seaboard, if they had gone through without delay, and the time when they actually arrived there; but the plaintiff's evidence clearly showed that there was considerable delay not attributable to the defendant, and it is consistent with the whole record that if there had been no other delays, that which occurred between Lapeer and Detroit would have caused no loss. The plaintiff therefore made out no cause of action in respect to this part of his case.

III. The third consignment was of masts to be taken for a short distance on the road of defendant to its junction with the Port Huron and Chicago road. For the transportation of these the plaintiff claims to have made special terms with one Fell, a local agent of defendant, at three dollars a car. Ten cars were moved, and \$30 paid for the service, but when the fact came to the knowledge of the superintendent, he repudiated this arrangement, denied the authority of Fell to make it, and exacted \$15 a car for the ten before moved, and for such as were moved thereafter. The only question on this part of the case is, whether Fell was vested with the authority he assumed to exercise, or whether the circumstances were such as to justify the plaintiff in dealing with him on the assumption that he possessed it.

Unfortunately the record presents somewhat blindly the facts which bear upon this question, and the members of this court do not agree in their construction of them. It would not prove useful to attempt an expression of our views under such circumstances, and as the case must go back for a new trial, this branch of the case will not be referred to further at this time.

The judgment is reversed for the error above pointed out, and the plaintiff in error will recover costs in this court.

The other Justices concurred.

See note, p. 89.

A. SUMNER

v.

SOUTHERN RAILROAD ASSOCIATION.

(7 *Baister (Tenn.) Reports*, 345.)

A common carrier, who receives freight for transportation over his own route and the lines of other carriers, cannot bind such other carriers as to the rate to be charged for transportation, unless there is an agreement to that effect between them. And such other carriers will not be held to have impliedly assented to the rates charged by the first carrier, if, in receiving freight to be shipped over their routes under a bill of lading issued by the

first carrier, they discover that the articles shipped are of a different character than those named in the bill of lading, and upon which the rates are higher. In such case they can transport the goods to their destination and charge and collect the increased rate.

APPEAL from the Hardeman Circuit Court.

Hill & Harden for complainant.

Vertrees for defendant.

FREEMAN, J.—Plaintiff shipped from St. Louis, by various steamboats, four lots of sewing machines, boxed up, put down in bill of lading, however, as hardware. The bill of lading specified that the shipment was to be sent to the wharf-boat at Memphis, "from thence by the Memphis and Charleston Railroad Company, or connecting roads, subject to the conditions of their several charters and freight regulations, and then be delivered at the company's depot at Bolivar, Tennessee, to A. Jordan, on presentation of this receipt, he or they paying the freight for the same at the rate of eighty-six cents per hundred pounds."

When the boxes arrived at Bolivar by the cars of the Southern Railroad Association, having been received from the Memphis and Charleston Railroad at Grand Junction, the agent of the defendant had bill of lading of the Memphis and Charleston Railroad for the freight as sewing machines, which, under the freight regulations of both railroads, were chargeable at higher rates than hardware, and were so charged in the bill of lading. The charge, however, was only the regular charge established by regulation for carrying such freight. The agent of defendant at Bolivar paid the charges on the bill of lading, which consisted of what was due the Memphis and Charleston Company, and also what was paid the steamboat company by the Memphis and Charleston Company on receipt of the boxes by that company, retaining also the charge of his own company.

Jordan, the agent of Sumner, paid the sum thus charged, under protest, insisting that the railroads could only charge the rate specified by the steamboat company, and then brings their suit to recover the excess, amounting to about \$33.

It is further shown that there was no privity or connection between the steamboat line and the railroad companies, nor any authority or agency on the part of the steamboat company or line to make any contract for carrying freight for the companies.

It further very clearly appears that Sumner was perpetrating a fraud on the companies, and probably on the steamboats, by boxing the goods so as to conceal their character, and shipping them as hardware, at a lower rate of charges than if the shipment had been made as sewing machines.

On these facts, is the plaintiff entitled to his recovery against defendants? is the question.

The bill of lading is but the contract of the steamboat company, and can only bind it, under the facts of this case, but can have no effect to bind the railroads, unless they had assented to its terms expressly or impliedly, by receiving the freight and shipping it at the same rates. By the contract with the steamboats, as contained in the bill of lading, they became the agents of Sumner to deliver the goods at the wharf-boat, and thence to the railroad company in the usual way. But, on a fair construction of the language of the contract, the companies had the right to charge their regular established freight on the shipment, for it is expressly stipulated that the railroads are to carry it "subject to their several charters and freight regulations." No doubt the steamboat agent, who made the contract, supposed the freight would be 86 cents per hundred pounds on the shipment as hardware; but when the true character of the article was accidentally discovered by the agent of the M. and C. Railroad at Memphis, he clearly had the right when he received the boxes to bill them truly, and charge the freight authorized by "the freight regulations" of his company; and the Southern Railroad Association, receiving the boxes as sewing machines, and transporting them as such, had also the right to charge for them in their true character, and, according to usage in such cases, pay the charges of the other company at their regular tariff for such articles. In a word, the error in the plaintiff's argument in the case is in treating the contract of the steamboat company to charge 86 cents per one hundred pounds as binding on the railroad companies, or in any way affecting their rights. In this view the plaintiff has only paid the steamboat what he contracted to pay, to wit, 86 cents, and has had his goods transported by the railroad companies in accordance with their freight regulations—their regular tariff—and cannot complain, especially in view of the fraudulent effort to evade, by shipping sewing machines as hardware. That his fraudulent purpose has failed of success can certainly not furnish a very substantial cause of action against the defendant, nor one that appeals to a court of justice with any plausibility for its aid.

We have been referred by plaintiff's counsel to two cases from Massachusetts, which are supposed to hold a different view from what we have presented. We have examined them, but do not find them applicable to the question. The syllabus of the case of *Robinson v. Baker*, 5 Cushing's R., 137, is as follows: "A common carrier who accepts goods for transportation from one not entitled to control them, has no lien upon the goods for his freight as against the owner; and it will make no difference that the carrier acted in good faith and was not in fault."

This is quite a different case from the one before us, the steamboat line in this case having undertaken as agent of Sumner to ship by these roads, and therefore having the right to control the goods

and deliver them to the company for transportation. While the case cited may be correctly decided on its facts, it is no authority against the view we have taken of the case before us. We doubt, however, its correctness in the entire proposition cited, as the carrier, it would seem at least, would be entitled to pay for the transportation on his own road what it was reasonably worth when the consignee took the benefit of his labor by receiving the goods from him at their point of destination.

The other case need not be noticed.

The case of *Schneider v. Evans*, 3 Am. R. 56, in its conclusions, sustains the view we have taken, and we think is sounder in its reasoning on this question than the case above referred to, though some of the reasoning of the judge in the last case we do not approve.

On the whole, we are satisfied the judgment for the defendant below was correct, and affirm it.

See note, p. 39.

HILL and others

v.

BURLINGTON, C. R. AND N. RY. Co.

(*Advance Case, Iowa. December 11, 1882.*)

The general freight agent of a railroad has no power to fix the rate over other connecting lines of railway; and an agreement between two connecting railroad companies to transport freight will not have the effect to make them joint contractors or parties.

The mere announcement of the rate for freight by the general agent of a connected railroad will not operate as a guarantee to the shipper of goods on the connected line.

APPEAL from Linn district court.

The plaintiffs aver in their petition that the defendant, as a common carrier, entered into an agreement with them whereby it undertook to transport for them a car-load of butter from Cedar Rapids, Iowa, to Denver, Colorado, and to deliver the same in good condition; that the butter was delivered to the defendant at Cedar Rapids in pursuance of such agreement, but that the defendant failed to deliver the same at Denver in good condition, whereby the plaintiffs sustained damage in the sum of \$833.80. They also aver that they were obliged to pay \$71.40 as an overcharge of freight. The defendant, for answer, denies that it made an agreement with the plaintiffs to transport butter for them from Cedar Rapids to Denver, and denies all liability for overcharge. There

was a trial to a jury, and verdict and judgment were rendered for the defendant. The plaintiffs appeal.

Deacon & Smith, for appellants. J. & S. R. Tracy and A. D. Collier, for appellee.

ADAMS, J.—The plaintiffs are the proprietors of a creamery at Springville, Iowa, at which place is a station on the Chicago, Milwaukee and St. Paul R. R. The butter was shipped from Springville over the Chicago, Milwaukee and St. Paul R. R. to Cedar Rapids; thence over the defendant's road to Burlington; thence over the Chicago, Burlington and Quincy R. R., and other roads, through Kansas City to Denver. It appears that from Kansas City the butter should have been shipped over the Kansas Pacific R. R., but by mistake it was shipped over a more circuitous and an improper route, and by reason of such mistake, and a failure to keep the car iced, the butter was injured. The defendant's position is, that it had no contract with the plaintiffs except to carry their butter safely over its own road and make proper delivery to the proper connecting lines, which it did. The plaintiffs, on the other hand, contend that the defendant's contract was that the butter should be carried safely to its destination. It is not claimed that such contract was expressed in so many words, but that the law implied such contract from the undisputed evidence as to what was said and done. They also contend that if the evidence is not sufficient to raise such contract by implication, it would have been but for the error of the court in excluding proper evidence offered by them.

The court gave three instructions at the request of the defendant, the giving of which the plaintiffs assign as error. The instructions are lengthy, and we cannot properly set them out verbatim. The court instructed the jury in substance that the facts relied upon by the plaintiffs (specifying them) did not, if proven, make the defendant more than a mere intermediate carrier, and that as such intermediate carrier merely it was not liable for an injury occurring beyond its line. The plaintiffs contend that, so far as the defendant is concerned, the assignment should be deemed to have been made, not at Springville, but at Cedar Rapids, and that the defendant was not, therefore, an intermediate but the initial carrier. One of the facts relied upon by the plaintiffs pertains to what was said and done respecting the rate of freight from Cedar Rapids to Denver. The plaintiffs, it appears, were acquainted with the rate of freight from Springville to Cedar Rapids. Having conceived the idea, however, of making a shipment to Denver, they made application to the station agent at Springville, of the Chicago, Milwaukee and St. Paul Co., to get them a through rate to Denver. He communicated this application to the assistant general freight agent of the Chicago, Milwaukee and St. Paul Co., who

applied to one Mohler, the general freight agent of the defendant. Mohler, to use his own language, gave the plaintiffs a rate of \$2.05 per hundred on the shipment in controversy from Cedar Rapids to Denver. This he did, however, by merely communicating with the agent of the Chicago, Milwaukee and St. Paul Co. The butter was then delivered to the Chicago, Milwaukee and St. Paul Co., properly marked as consigned to the plaintiffs at Denver, and the Chicago, Milwaukee and St. Paul Co. issued to them a bill of lading, which was the only bill of lading issued. Up to that time no communication appears to have been had directly between the plaintiffs and defendant. The delivery to the defendant was made by the Chicago, Milwaukee and St. Paul Co., and no contract appears to have arisen between the plaintiffs and defendant except by implication from the receipt of the goods by the defendant from the Chicago, Milwaukee and St. Paul Co.

We are unable to discover anything from the facts above set out tending to show that the defendant was more than a mere intermediate carrier. It is true, the defendant's general freight agent did what he called giving a through rate from Cedar Rapids to Denver. But this did not, we think, make the defendant in any sense the initial carrier, nor joint contractor nor partner with the companies between the terminus of its road and Denver. There is nothing tending to show that Mohler did anything more than to communicate the aggregate of the previously-established rates on through freight. Possibly, as he was general freight agent of the defendant, it should be inferred that he had the power to fix the rate of freight over the defendant's road, but we see nothing tending to show that he had the power to fix the rate of freight over the other roads, and even if he had it does not appear to us that it would follow that the defendant became joint contractor or partner with other roads. But it is said that there is direct evidence of an agreement, at least with the Chicago, Burlington and Quincy Co., and that it was through the fault of that company that the loss occurred. But the agreement with that company appears to have been a mere agreement as to their respective charges on freight that should be shipped over both roads. A violation of such agreement by either might render it liable to the other in case the other had guaranteed a through rate on the strength of the agreement. It would not, we think, have the effect to make the companies joint contractors or partners.

We have to say that we see no evidence tending to show that the defendant and the other companies, or that the defendant and the Chicago, Burlington and Quincy Co., were joint contractors or partners. The plaintiffs contend, however, that the instructions were erroneous, at least in so far as they precluded a recovery for the overcharge. If any recovery could be had for the overcharge, it must, we think, be upon the theory that the defendant guar-

anted the rate of \$2.05 to the plaintiffs. They insist that the evidence tends at least to support such theory. The defendant, on the other hand, insists that whatever guarantee was made, if any, was made to the Chicago, Milwaukee and St. Paul Co., with whom alone they had communication, and from whom they received the freight. In our opinion, the defendant's position must be sustained. It is true, Mohler testified he gave the plaintiffs the rate. But the fact appears to be that the plaintiffs' names were not mentioned, and the communication was made solely to the Chicago, Milwaukee and St. Paul Co.

One Sweatt, station agent at Cedar Rapids of the Chicago, Milwaukee and St. Paul Co., acting under an order made to him by telegram, in these words, "Get a rate on 17,000 pounds of butter, Cedar Rapids to Denver, coming from Springville," applied at Mohler's office for such rate, and the same was given him orally, and a memorandum was made that the rate was asked for by Sweatt as agent of the Chicago, Milwaukee and St. Paul Co. Mohler being asked if he guaranteed the rate, answered: "We did to the Milwaukee Company." It does not appear that he did so specifically; but we infer from the evidence that there was a general understanding that rates called for and given, as this was, were considered as guaranteed to the company which calls for the rate. We could not hold that the defendant guaranteed the rate to the plaintiffs without holding that, as a matter of law, the mere announcement of the rate to the initial carrier operated as such guarantee to the shipper. Whether the guarantee made to the Chicago, Milwaukee and St. Paul Co. should be deemed to inure to the benefit of the plaintiffs is another question. They contend that it should. But it appears to us that the defendant's agreement was to the effect merely that whatever through rate from Springville the Chicago, Milwaukee and St. Paul Co. should agree upon with the plaintiffs, the defendants and companies on the west would demand as their share only \$2.05 per hundred. We do not say that if the defendant had collected for itself more than its published tariff rate, and the plaintiffs had thereby been compelled to pay in the aggregate more than they agreed to pay, the defendant would not be liable directly to the plaintiffs. But such is not the complaint. The defendant, it is shown, received \$15, and it is shown that that was its due share. The complaint is that the defendant has not fulfilled its guarantee in respect to the charges of others. Such guarantee, we think, was designed to be personal as between the defendant and the Chicago, Milwaukee and St. Paul Co. as the initial carrier, and made to enable the latter to fix the through rate from Springville. We have not discussed every consideration urged by the plaintiffs. We deem it sufficient to say that we think that the record discloses no evidence introduced or offered upon which a right of recovery can be based. Affirmed.

See note, p. 39.

THE MICHIGAN CENTRAL R. R. Co.

v.

PARIS MYRICK, for the use of the COMMERCIAL NATIONAL BANK
OF CHICAGO.*(Advance Case, U. S. Supreme Court. January 8, 1888.)*

Among connecting carrier lines the common law duty of each road is only to safely carry over its own route and safely deliver to the next carrier.

Each road may, however, extend its liability over the whole route by special contract; but such contract must be proved by clear and satisfactory evidence, and will not be inferred from doubtful expressions or loose language.

As far as the route is concerned, the duty of a railroad as a carrier of live animals is the same as its duty as a carrier of goods.

The form of receipt in the case at bar construed not to be a contract to carry beyond the end of the line of the carrier giving it.

The receipt of goods for a place named beyond the road of the company, the posting of through rates in its depots, and the agreement that the receipt might be exchanged for a through bill of lading, do not prove an assumption of liability beyond its line.

What constitutes a contract of carriage is a question of general law, in which this court will exercise its own judgment, and will not be bound by state decisions.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action for breach of two alleged contracts of the Michigan Central R. R. Co. with the plaintiff, Paris Myrick, each to carry for him two hundred and two head of cattle from Chicago to Philadelphia, and there deliver them to his order. It arises out of these facts: Myrick was in 1877 engaged at Chicago in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The company is a corporation created by the State of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which, by its connections, leads to Philadelphia.

In November, 1877, Myrick purchased two lots of cattle, each consisting of two hundred and two head, and shipped them over the road of the company. One of the purchases and shipments was made on the 7th and the other on the 14th of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle.

On the shipment of the cattle Myrick took from the company a receipt as follows:

"MICHIGAN CENTRAL RAILROAD COMPANY,

"Chicago Station, Nov. 7, 1877.

"Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. & W. Blaker, Philadelphia, Pa.):

Articles.	Weight or measure.
Two hundred and two (202) cattle.....	240,000

"Advance charges, \$12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at —

"WM. GEAGAN, Agent."

On the margin of the receipt was the following:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller, the approximate weight having been ascertained by track-scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

"NOTICE.—See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond the termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for the purpose of delivery to such carrier as the agent of the consignor or consignee, and not as carrier. The company will not be liable or responsible for any loss, damage, or injury to the property after the same shall have been sent from any warehouse or station of the company."

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank at Chicago a draft, of which the following is a copy:

"\$12,287.57.]

"CHICAGO, Nov. 7, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of

PARIS MYRICK.

"To J. AND W. BLAKER, Newtown, Pa."

As security for its payment Myrick endorsed the receipt obtained from the railroad company and delivered it with the draft to the bank, which thereupon gave him the money for it.

The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uni-

form custom in the course of business of the railroad company, they were turned over to the drove-yard company, which was formed for the purpose of receiving cattle arriving there, taking care of them, and delivering them to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carrier's receipt, transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession of the cattle, sold them, and appropriated the proceeds. The lot shipped on the 14th of November were delivered in like manner to the Blakers by the drove-yard company without the production of the carrier's receipt given to the bank, and were in like manner disposed of. Soon afterwards the Blakers failed, and the two drafts on them, one made upon the shipment of November 7 and the other on the shipment of November 14, were not paid. Hence the present action for the value of the cattle thus lost to the bank, Myrick suing for its use.

It appeared on the trial that Myrick had made previous shipments of cattle from Chicago to Philadelphia and taken similar receipts from the Michigan Central R. R. Co.; that the cattle shipped had always been delivered by the Pennsylvania Company at Philadelphia to the drove-yard company there, and by that company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle, and had particular pens in the yards assigned to them; that the cattle of the shipments of November 7 and November 14 were on their arrival placed by the superintendent of the drove-yards in those pens, and were sold by the Blakers on the following day, and that the carrier's receipt was not called for either by the railroad or the stock-yard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied the cattle from Chicago until their delivery at the drove-yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was fifty-eight cents per hundred; that notice of this rate was posted in the station of the defendant company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but collected it from the drove-yard company.

The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this: that as the road of the Michigan Central R. R. Co. terminates at Detroit, the company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not of themselves establish such a contract.

The court refused to give this instruction, or any embodying the

principle which it expresses. On the contrary, it instructed the jury that the receipt, termed bill of lading, under the circumstances in which it was made, was a through contract, whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant company with the plaintiff Myrick and with any assignee or holder of the contract. The facts attending the transaction not being disputed, there could be only one result from this instruction—a recovery by the plaintiff. From the judgment entered thereon the case is brought to this court for review.

George F. Edmunds, for plaintiff in error.

W. C. Larned, for defendant in error.

FIELD, J.—The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusion reached.

A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are entrusted to it for transportation within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line, that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *Railroad Co. v. Manufacturing Co.*, "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." (16 Wall. 324.)

This doctrine was approved in the subsequent case of *Pratt v. R. R. Co.*, 22 Wall. 123, although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. (See, also, *Insurance Co. v. R. R. Co.*, 104 U. S. 157.)

The general doctrine, then, as to transportation by connecting lines, approved by this court and also by a majority of the State courts, amounts to this: that each road, confining itself to its common law ability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central R. R. Co. assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not on its face import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia, or that it was received for transportation there. It only says that it is consigned to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds: "Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central R. R. Co. to the warehouse at —," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "Notice.—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier; and that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through

contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common law responsibility of carriers has no application. There is, as already stated, no common law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station-house at Chicago. Such notices are usually found in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line.

It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. (*Ill. Central R. R. Co. v. Frankenberg*, 54 Ill. 88; *Same Company v. Johnson*, 34 Ill. 389.)

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law upon which the decision of a State court must

control. It is a matter of general law, upon which this court will exercise its own judgment. (*Chicago City v. Robbins*, 2 Black, 429; *Railroad Co. v. National Bank*, 102 U. S. 14; *Hough v. Railway Co.*, 100 U. S. 213.)

If the doctrine of the Supreme Court of Illinois as to what constitutes a contract of carriage over connecting lines of roads is sound, it ought to govern not only in Illinois, but in other States; and yet the tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. (*Nutting v. Railroad Co.*, 1 Gray, 502; *Burroughs v. Railroad Co.*, 100 Mass. 26.) If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place beyond the road of the company—in different States, holding it to imply one thing in Illinois and another in Massachusetts.

The judgment must be reversed and the case remanded for a new trial; and it is so ordered.

Reversed.

See note, p. 29.

LINDLEY

v.

RICHMOND AND DANVILLE R. R. Co.

(*Advance Case. North Carolina, 1882.*)

A railroad company receiving goods for transportation may contract to carry them beyond the limits of its own road and of the State in which it is chartered, and may assume all the responsibilities incident to such an undertaking. In the absence of such contract, it is only liable for the extent of its own route and the safe storage and delivery to the next carrier.

The R. and D. R. Co. gave a through bill of lading for certain fruit trees to be transported over the Piedmont Air Line. The bill of lading contained clauses exempting the company from all liability except on its own road, and in case of injury or delay restricting the right of action so that it should be only as against that road whereon the injury or delay occurred. The Piedmont Air Line consisted of three connecting roads operated by the R. and D. R. Co., but the line proper of said company constituted no part of it. The last of said above-mentioned three connecting roads received the trees in good time and delivered them fifteen days after in a damaged condition. There was no evidence, except as above, to show upon which road the damage occurred. In an action by the shipper against the R. and D. R. Co. to recover damages for the loss:

Held, That the terms of the bill of lading could not be held to exempt the defendant for liability for the loss occasioned by detention on the roads operated by it. *Held*, further, that the delivery in bad condition by the last

of the lines connected with the defendant into whose hands the goods came constituted prima-facie evidence of default on the part of defendant.

The measure of damages in the above case was the difference between the market value of the goods at the time when they ought to have been delivered and the market value when they were in fact delivered, if in equally good condition, and, if not, with an increase to the extent of the deterioration resulting from the unnecessary delay in forwarding.

SMITH, C. J.—The plaintiff Lindley, on behalf of his firm, on October 28, 1880, directed the defendant's agent at Greensboro, issuing for that purpose a printed form prepared by the company and addressed to "the agent of the Richmond and Danville R. R. Company," at that place, to transport three boxes of fruit trees thence to Burnsville, Alabama, at the foot of which was a printed memorandum, "See conditions other side." On the reverse page are numerous printed conditions of which that numbered 12 is in these words:

"This company will not receipt for or guarantee the transportation of any article of freight beyond the point to which bill of lading is given. Goods or property consigned to any place off the company's line or road, or to any point or place beyond its termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner; the company acting for the purpose of delivering to such carrier, as the agent of the consignor or consignee, and not as carrier; they agreeing not to hold the company liable or responsible for any loss, damage, or injury to the property, after the same shall have been sent from any warehouse or station of the company."

At the same time the said agent gave a receipt in a printed form bearing the heading, "Piedmont Air Line Railway," of the said goods, marked, "J. Van Lindley, Ala., via Selma, Rome and Dalton R. R.," as follows: "Greensboro, Oct. 28, 1880. No. 20. Received from J. Van Lindley the following property, in apparent good order, contents and value unknown, to be transported to Burnsville, Ala., upon the conditions endorsed hereon, describing the articles as stated." The conditions to which reference is made are the same as those on the preceding paper.

Thereupon, at the same place and date a bill of lading was signed by the agent and delivered to Lindley, designated at the top as a "Through Bill of Lading," and with a similar marginal marking, as follows:

"Received of J. Van Lindley, in outward apparent good order, *inward condition of contents unknown*, and for which (*viz., condition of contents*) this company or any of its connections to place of delivery shall not be responsible, packages, value unknown, to be transported by the Richmond and Danville Railroad Company to Charlotte, thence by connecting lines to Burnsville, Ala., three boxes fruit trees, released and fruit guaranteed (the italics are in

the bill), supposed to be marked and numbered as per margin, to be transported as above specified, and delivered to the agents of the connecting railroad companies or steamers, and by them to be delivered to the next connecting railroad company or steamer, until said goods or merchandise shall have reached the point named in the receipt. As the packages aforesaid must pass through the custody of several carriers, it is understood as a part of the consideration on which said packages are received, that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of said packages as though inserted herein at length. . . . "And it is expressly understood that for all loss or damages occurring in the transit of said packages, the legal remedy shall be against the particular carrier in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the Richmond and Danville Railroad Company, in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage than may be incurred on its own road, and it is expressly confined to the road and stations of the Richmond and Danville Railroad Company."

The goods were forthwith and without delay conveyed on the train of the next day to Charlotte, and on the 30th day of October were delivered to the Charlotte, Columbia and Augusta Railroad, arriving at their destination on the 15th day of November thereafter. The Richmond and Danville, the North Carolina and the Charlotte, Columbia and Augusta railroads, all under the control and management of the defendant company, constitute in their connection what is known as the Piedmont Air Line Railway. There are three other lines of railroad to be traversed after leaving Augusta before the articles reach the place of final delivery to the consignee, and six days is the usual time required in transportation, and it was not shown on which of the roads south of Charlotte the default occurred. In consequence of the delay, the plaintiff's numerous contracts of sale of the trees to persons at and near Burnsville, to whom those sent were deliverable on the 9th day of November, were forfeited, to obviate the losses of which they made strenuous efforts to dispose of them to others, and, as compared to the sums to be paid under the contracts, suffered a damage of several hundred dollars.

The defendant company in the contract expressed in the bill of lading specifically undertakes to carry the goods over its road from Greensboro to Charlotte, and there, acting as a forwarding agent of the plaintiffs, to deliver them to the next carrier on the line of transportation to the point of ultimate destination in Alabama, and the like obligation is assumed for each of the successive carriers. This duty would in law result from an association of the companies, under a common arrangement among them, to receive from

each other and forward the goods on to the place of ultimate delivery, in the absence of a contract by the receiving company itself to carry the goods over the whole route, using the successive lines as agencies of its own in fulfilling its stipulation. Indeed, it seems to have been doubted whether the contract for the entire transportation did not rest solely upon the receiving carrier, and, again, whether one corporation could contract to convey goods beyond the limits of the State which gave the company corporate existence. But it is now settled, in accordance with the necessities of commerce, that a receiving company may undertake to convey goods beyond the limits of its own road and of the State in which it is chartered, and assume all the responsibilities incident to such undertaking; while, in the absence of such contract, it "is only liable for the extent of its own route and the safe storage and delivery to the next carrier." 2 Red. Rail., Secs. 162, 163, and notes; *Phillips v. The N. C. R. R. Co.*, 78 N. C. 294.

The terms of the defendant's contract are plainly and distinctly defined in the words "to be transported as above specified, and delivered to the agents of the connecting railroad companies or steamers, and by them to be delivered to the next connecting railroad or steamer, and in like manner to each connecting railroad company, or steamer, until said goods or merchandise shall have reached the point named in the receipt."

The obligation resting on each attaches as soon as the goods pass into its custody, and ceases only when safely carried and delivered to the successor. The defendant company, it is explicitly declared, "assumes no other responsibility for their safety or safe carriage than may be incurred on its own road, and it is expressly confined to the roads and stations of the Richmond and Danville Railroad Company." Now the Richmond and Danville Railroad Company control, manage and operate the three roads, forming the Piedmont Air Line Railway, and is consequently answerable for defaults in the corporate management of each. The freight was not strictly received on the Richmond and Danville Railroad, nor conveyed over any portion of it, but it passed into the custody of the company bearing that name, and it agrees to convey over and be responsible for the safe carriage of the goods over their North Carolina railroad track, designating it by their own name, and properly, because solely operated by it. The clause which we have last quoted from the contract does not mean in restricting its liability "to the roads and stations of the Richmond and Danville Railroad Company," to confine it to the line of road between Richmond and Danville, or Greensboro, since it would in such case have contracted no obligation whatever, as no portion of it was to be traversed, nor was it intended to exclude the defendant, as managing and operating also the Charlotte, Columbia and Augusta Railroad, from its proper responsibilities as a carrier over

that road. Indeed, such a contract, if made, would be, in effect, to absolve the defendant company from all liability for negligence in carrying the goods over that portion of the route, and would be utterly forbidden by public policy, and void. The defendant company then, as representing and operating the line of the Charlotte, Columbia and Augusta Railroad in the place of that corporation, receive the goods at Charlotte in due time, and fifteen days thence elapse before they reach the consignee at Burnsville in a damaged condition, and there is no explanation as to how or where the needless detention occurred, nor upon which of the roads on the route the culpability rests therefor.

In our opinion, the defendant company, in the absence of such evidence, as representing the last company whose road is under its control, in the course of transmission must be held responsible for the injury suffered by reason of the delay.

"It seems to be regarded as settled," says Judge Redfield, "that the persons or corporations who come into the use of a railway company's powers and privileges, are liable for their own acts while continuing such use, and also for the continuance permissively of any wrong which had been perpetrated by such company upon land-owners or others by means of permanent erections which still remain in the use of their successors." Red. Rail., Sec. 145, par. 2.

And so the non-delivery or delivery in bad condition by the last of the lines connecting with the defendants by which the goods ought to have been carried after they left defendant's hands, is prima-facie evidence of default in the defendant. Abb. Trial Evi. 571; Laughlin v. Chicago, etc., Railway Co., 28 Wis. 204; S. C., 9 Am. Rep. 493; Dixon v. R. & D. R. Co., 74 N. C. 338.

But we think there was error in the rule laid down by the Court for estimating the damages of the plaintiffs, which was in substance the loss of the fruits of the several contracts with purchasers in consequence of their inability to make deliveries in time. In *Home v. Mid. Rail. Co.*, the plaintiffs had made a contract to deliver shoes for the use of the French army at a very high price and at a fixed time. Information was given the defendant of the time of contract delivery, but not of the special notice of the contract. The delay in transportation prevented a compliance with the terms, and the contract was lost. It was held that the defendants were not liable for the difference between the ordinary market value of the shoes and the contract price, they not being informed of the special circumstances that led to the loss. L. R. 7, C. P. 583, affirmed in L. R. 8, C. P. 131.

In this case Keating, Judge, said: "There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts, and assented to accept the contract on those terms." Wood's Mayno Dam., Secs. 34, 38, 41.

In *Mace v. Ramsey*, 74 N. C. 11, the contract, for violating which the action was brought, was for the construction of a boat to be used for the accommodation of persons expected on an excursion train, and the plaintiff engaged this boat and passengers to fill it. The boat was not built in time, and consequently the fares of the passengers engaged were lost. It was declared that as this contract was for a specific occasion and purpose, and the damage immediately and necessarily follows the breach, it was reasonably contemplated by the parties and could be recovered.

The true measure of the damages in the present contract, in the absence of any information to quicken the diligence of the carrier and enable him by greater activity to avert the loss, is the difference between the market value of the goods at the time when they ought to have been delivered and were in fact delivered, if in equally good condition, and if not, with an increase to the extent of the deterioration resulting from the unnecessary delay in forwarding.

Following the practice pursued in *Burton v. The W. and W. R. R. Co.*, we reopen the issue as to damages and remand the cause, to the end that an inquiry thereof be made in the court below. The appellant will recover the costs of the appeal. Let this be certified.

See note, p. 39.

CUMMINS et al.

v.

DAYTON AND UNION RY. Co. et al.

(*Advance Case Indiana. October 2, 1882.*)

Railroad companies have the power to contract to carry goods beyond their own line, and where they enter into such contract they will be liable as a common carrier throughout the whole transit.

Three railroad companies, whose lines formed a continuous road between X and Y, held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A at X shipped goods with one of the companies addressed to B at Y, and took a receipt whereby the company undertook to forward as per directions. Said receipt contained numerous provisions limiting liability, and provided that all the carriers transporting the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. *Held*, that said carrier had contracted to carry the goods through to Y, and was liable for a loss occurring in consequence of delay in said transit although the same occurred beyond its own line.

APPEAL from the General Term.

S. M. Shephard, for appellant.

A. C. Harris, for appellee.

WALKER, J.—Appellee moves to dismiss the appeal in this cause on the ground that no bill of exceptions was ever filed containing the evidence in the case and embracing the rulings of the Court during the trial. The assignments of error are the overruling of the motion for a new trial, and the actions of the Court in overruling the demurrer of the appellant to the 1st and 2d paragraphs of the amended complaint. Of course, nothing is saved on the motion for a new trial for the want of a bill of exceptions. Yet the action of the Court on the demurrer may yet be considered. The motion to dismiss the appeal will therefore be overruled. A decision on the following facts will dispose of all the questions properly saved for review:

Appellees were nurserymen, and, prior to October 20, 1880, had sold a nursery stock in lots to divers persons in Illinois, and which was to be delivered to purchasers in packages on the 26th day of October, 1880; that at the time of the date first written, and thereafter, the appellant and the C. C. C. and Indianapolis Ry. Co. and the I. B. and W. Ry. Co. were operating railroads as common carriers for hire, and were transporting all articles of merchandise on their respective lines of rail, and in combination of connecting lines extending from Dayton, Ohio, to and beyond Danville, Illinois, forming a continuous line of transit between said places, and so held themselves out to the public generally as carriers of property from Dayton, Ohio, to Danville, Illinois; that before the 22d day of October, 1880, appellee had purchased a nursery stock of the Heiks Nursery Co. of Dayton, of the value of \$5000, and on the 22d day of said month said nursery company placed on the car of the appellant said stock to the appellees to meet the sales they had previously made; that the appellant received said goods on said day, and acting for itself and the other roads named, gave to the said Heiks Nursery Co. a receipt on the day last named for the goods aforesaid, to be forwarded as per direction marked to appellees at Danville, Ill.; that the railroads were careless, and in the transportation of the goods, that a reasonable time for the transfer of said goods from Dayton to Danville would be forty-eight hours, that the car containing said goods was permitted to remain negligently upon the said tracks at Indianapolis until the morning of the 27th day of October, 1880; that the car containing the goods arrived at Danville at noon on the 27th of October; that the said roads had been informed of the character of the stock, and notified of the importance of an early delivery.

The only question is, Did the Dayton and Union Ry. Co. undertake to transport the goods to their terminus, Danville, Illinois, or did it only stipulate to carry the stock to the termination of its own road, and to forward only from that point by another road? There can be no question that the implied obligation of a common carrier is limited by the termini of its own route. P. C. and St. L.

v. Morton, 61 Ind. 539. But it is equally true that a railroad corporation has the power to make contracts with other carriers by land or water to carry its freight over the lines of such other carriers. For this purpose it sometimes contracts with connecting companies, and sometimes owns the means of transportation, or may send its loaded cars the entire length of the route over the roads with which it has made such contracts for the transportation of its freight. A railroad corporation having such capacity to contract for the transportation of goods beyond its line thereby becomes liable for injuries occurring through the default of the other carriers with whom such contract has been made.

In *Railway Co. v. McCartney*, 96 U. S., p. 258, it is said that corporations, unless forbidden by their charter, have the power to contract for shipment the entire distance over any connecting line. The company is liable upon the other lines as upon its own.

In such case the public have the right to assume that the company has made all the arrangements necessary to the fulfilment of the obligation it has assumed.

It was said in *22 Wall, 123, Railroad Co. v. Pratt*, that ordinarily it is the duty of the carrier in the absence of any special contract to carry safely to the end of its line, and to deliver to the next carrier on the route beyond. . . In reference to contracts to transport over other lines, such may be shown by an express undertaking, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through the entire route. On the same points see *Baltimore & Pa. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Wheeler v. San Francisco & Alameda Railroad*, 31 Cal. 46; *Cincinnati, Hamilton, Dayton & Richmond R. R. v. Pontius Richmond*, 19 O. St. 221; also *Pierce on Railroads*, 510, where the authorities are fully collected. Will not the facts pleaded intercept a demurrer admitting their truth, and bring the case within the rules just announced? The appellant and the other carriers represented and held themselves out to the public as having connecting lines forming a continuous transit between the points named, and in a combination for the transportation of freight on the entire route; and that the appellant, in addition to so representing itself as a carrier on the through freight line, acting for itself and the other defendants, gave the receipt which is attached to the amended complaint in which the appellant acknowledges the receipt of the goods to be forwarded as per directions below—viz., *J. T. Cummins & Co. (Appellees), Danville, Ill.*

It was also provided in the receipt that it is a part of the agreement that all the carriers transporting the property therein receipted for, as a part of the through line, shall be entitled to the benefit of all the exceptions and conditions above mentioned.

The appellant received the goods in good order, and marked as consignee in the margin J. T. Cummins, Danville, Ill., which goods they agreed to deliver with such reasonable despatch as the general business would permit, etc. It therefore appears that the appellant and the other roads held themselves out to the public as a through line for the transportation of freight on their line of transit as connected; that the appellant so acted for itself and for them by receiving and shipping the freight of appellees, which appellant agreed to ship to its destination, guaranteeing the through freight, and providing for certain terms in behalf of other carriers which appellant designated "as a part of the through line." Under these circumstances I have no hesitation in coming to the conclusion that the appellant undertook to transport the nursery stock from Dayton to Danville; and while a part of the route was over another road, yet that it was a part of the appellant's "through line," and therefore appellant became liable for any default of such other line in not delivering such stock in a reasonable time, and in permitting an unreasonable delay on the side track at Indianapolis. I think that the judgment against appellant was right, and the cause ought to be affirmed.

Judgment affirmed.

The general subject of extra-terminal liability and connecting lines has been fully treated by Mr. Lawson in his "Contracts of Carriers," and the cases on the point have been there collected up to the time of the publication of that book, viz., the year 1880.

A number of cases have been decided since that time three of which are reported above. It is proposed in this note to set out briefly the other cases lately decided upon this point, so that our readers may have easy access to all the cases on the subject.

United States Courts.—A common carrier is not in the absence of a special contract liable for injuries occurring on a connecting road beyond its own line.

Such special undertaking cannot be inferred:

(1.) By the entry of the carrier into an arrangement with the connecting lines to carry freight at tariff rates, or at any special rates furnished by the other lines.

(2.) By the giving of a way bill, which expressed the goods to be consigned to an extra-terminal point, but which purports to be a manifest of freight from one terminus of the road to another. *St. Louis Ins. Co. v. St. Louis v. T. H. and Ind. R. R. Co.* (U. S. S. Ct.), 8 Am. and Eng. R. R. Cas. 260.

In the absence of a special contract the liability of a common carrier does not exist for injuries to goods occurring beyond its own line. The mere receipt of such goods, marked to an extra-terminal point, and the naming of a through freight therefor, does not constitute such liability.

Stewart v. Terre Haute and I. R. R. Co., 1 McCrary, 812.

Where three railroad companies having connected lines of road and a steamship company connecting with the terminal line contracted to transport goods over the whole line, and said goods were damaged while in transit in the custody of one of the companies: *Held*, that the companies were all jointly liable, and that notwithstanding a clause in the bill of lading providing that

that company alone should be liable in whose charge the goods might be at the time an injury occurred.

Milne v. Douglass et al., 13 Fed. Rep. 87.

Alabama.—A carrier receiving goods marked to a point beyond his own line is liable for any injury occurring while in transit, until the goods arrive at their destination, unless, indeed, he specially limits his liability.

Mobile and Girard R. R. Co. v. Copeland, 63 Ala. 219.

California.—See *Dresbach v. California Pacific R. R. Co.*, 2 Am. and Eng. R. R. Cas. 281.

Illinois.—A railroad company may either limit its liability to its own line, or extend it beyond its terminus.

St. Louis and Iron Mt. R. Co. v. Larned (Ill.), 6 Am. and Eng. R. R. Cas. 436. See *Mich. Cent. R. Co. v. Myrick*, *supra*.

Iowa.—See *Hill v. Burlington C. R. and N. R. Co.* *supra*.

Massachusetts.—Where freight is carried over connecting railroads, each road is liable for loss or injury accruing through its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers.

Argen v. Boston and Me. R. Co., 6 Am. and Eng. R. R. Cas. 426.

Michigan.—The mere receipt of goods by a carrier marked to a point beyond his own line does not render him liable for their safety beyond said line. If, however, said carrier receipts the goods to be transported to such point, and charges the consignor a larger sum therefor, it is liable to the consignor for the excess.

Detroit and Bay City R. Co. v. McKenzie, 43 Mich. 609; S. C. *supra*.

Missouri.—The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line. A station agent has no such power, and such a contract entered into by him is void, unless he has express authority from his proper superior officer, or there have been previous dealings, from which such authority on his part may be reasonably inferred.

Grover B. Sewing M. Co. v. Mo. Pac. R. Co., 70 Mo. 672.

A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus of its own line.

Wiggins Ferry Co. v. Chicago and Alton R. Co., 73 Mo. 389; 5 Am. and Eng. R. R. Cas. 1.

In the absence of any special contract a carrier receiving goods marked to a distant point is not liable for an injury occurring beyond his own line. The mere giving of a through rate to the shipper does not constitute an assumption on his part of such responsibility.

McCarthy v. Terre Haute and Ind. R. Co., 9 Mo. App. 159.

Railroads doing business together, sharing profits and sending freight over one or the other of the combined lines, at their pleasure, or the shipper's request, make themselves jointly liable to the shipper. Testimony to show that such railroads form a line, have a common office, and employ a general freight agent, may go to the jury to prove the existence of such a relation between them as will render them jointly liable.

Barrett v. Indianapolis and St. L. R. Co., 9 Mo. App. 226.

New York.—Where the company defendant by mistake checked the plaintiff's baggage over a wrong line of connecting roads, it was held not liable for an injury occurring beyond its own line.

Isaacson v. N. Y. Cent. and Hudson River R. R. Co., 25 Hun, 350.

North Carolina.—See *Lindley v. Richmond and Danville R. R. Co.* *supra*.

Ohio.—Where it is necessary for a traveller in going from place to place to pass over several connecting lines of railroad, it is competent for either company to contract with him for the carriage of himself and his baggage over

the entire route. The receipt of fare in advance by such company for the whole distance constitutes such a contract, and renders the carrier liable as aforesaid.

Baltimore and Ohio R. Co. v. Campbell, 36 Ohio St. 647, 3 Am. and Eng. R. R. Cas. 346.

Pennsylvania.—In the absence of stipulation by a carrier to transport freight beyond its own line, it is not responsible for the default of those whom it employs to convey it the remainder of the distance. But if it make itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading, it will be liable for a loss or misdelivery beyond its own line.

Where a company holds itself out as a "Through freight line," and contracts to carry as such, it will be held liable for all losses occurring up to the point of destination.

Clyde v. Hubbard, 88 Pa. St. 358.

Tennessee.—A railroad company receiving goods for shipment, marked to an extra-terminal point, is liable for all losses occurring beyond its own line. In the absence of a special contract limiting its liability such contract will be presumed from the fact that a clause thus limiting liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading.

East Tenn., V. and G. R. R. Co. v. Brumley, 5 Lea, 401, 6 Am. and Eng. R. R. Cas. 356. See **Sumner v. Southern R. Assn.** supra.

Texas.—Where several carriers unite to complete a line of transportation, and receive goods for freight, and give a through bill of lading, each carrier is the agent of the others, and is liable for any damage to the goods on whatever part of the line the damage is received.

Texas and Pac. R. Co. v. Fort, 14 Rep. 819.

Vermont.—In the absence of a special contract a carrier receiving goods marked beyond his own line, and who has no special business connection with the next succeeding carrier, is not responsible for the safety of the goods after they leave his hands. It is no fraud to suppress a clause in the bill of lading limiting his liability to his own line from an ignorant and unlettered consignor, for such clause is only expressive of the common law.

Hadd v. United States and Canada Ex. Co., 52 Vt. 835; 6 Am. and Eng. R. R. Cas. 443.

BENJAMIN F. VAUGHAN

v.

THE PROVIDENCE AND WORCESTER R. R. CO.

(*Advance Case, Rhode Island. February 4, 1883.*)

Cotton was forwarded from Louisiana to be delivered in Providence, R. I., "rates guaranteed to Providence." By the error of some intermediate carrier the destination Providence was changed to Chicopee, Mass., whence, by the owner's direction, the P. and W. R. R. Co., after paying charges, brought it to Providence. The owner refused to refund to the P. and W. R. R. Co. its charges for freight paid and replevied the cotton.

Held, that the P. and W. R. R. Co. had a lien on the cotton for its freight and charges for back freight paid.

Sending the cotton to Chicopee raised the freight above the amount guaranteed by the first carrier.

Held, that for this the owner might have his action against such first carrier, or against the carrier by whose error the cotton was sent to Chicopee.

A carrier receiving goods from a tortious holder has no lien on them against the owner, but a carrier receiving goods from one who, by the owner's act, has been clothed with an apparent authority, has a lien on them against such owner.

By delivery to the carrier in Louisiana the owner made each successive carrier his agent for forwarding the cotton.

REPLEVIN. Heard by the Court, jury trial being waived.

Hopkins & Potter, for plaintiff.

Edwin Metcalf, for defendant.

POTTER, J.—The cotton in question was purchased in Texas. The original bill of lading, given at Shreveport, La., Feb. 12, 1880, acknowledges the receipt of it in good condition, etc., to be delivered in Providence, R. I., on paying a certain stipulated rate of freight; "rates guaranteed to Providence, R. I." The word Providence was on the bales. The owner's name was not on them, but the cotton was described by other marks.

The cotton seems to have arrived safely at New York, and thence, instead of being forwarded to Providence by a more direct route, was sent to Chicopee, Mass. The mistake seems to have been made in the office of the company at New York which forwarded it, although there is no very positive evidence as to this. The copy of the bill of lading which was sent from New York with the goods contained the words Chicopee, Mass., where the original had the words Providence, R. I. Both original and copy contain the words, "notify B. F. Vaughan, Providence, R. I."

The cotton arriving at Chicopee, the officers of the Chicopee Railroad notify Mr. Vaughan, the owner or consignee, by letter of March 6, 1880, directed to Providence, and he replies by letter dated Providence, March 8, saying, "you will oblige by forwarding the 51 bales, and any more of this mark that may arrive billed to me."

The freight to Chicopee was \$284.62. The guaranteed rates would have amounted to about that sum; and if the cotton had not been mis-sent that sum would have about covered the freight to Providence. This sum the Providence and Worcester R. R. Co. paid to the Chicopee R. R. Co., and the plaintiff paid to the Providence and Worcester R. R. Co.; but the Providence and Worcester R. R. Co. demanding \$65.91 for their own charges and holding the cotton for it, the plaintiff replevied the cotton.

There is no dispute but that the charges from New York to Chicopee and from Chicopee to Providence were reasonable, if those roads had a right to make any charge at all.

The goods having by somebody's blunder been mis-sent from

New York to Chicopee, was the owner liable for the freight between those two places, and could he have obtained the goods without paying it?

If one person takes another's goods from his possession tortiously, or without his consent express or implied, and sends them by a carrier, it is well settled that the carrier must look to the one who employed him, and has no legal claim or lien for freight as against the owner. In cases of doubt the carrier must protect himself by requiring payment in advance.

But it seems to be the rule of common sense and supported by the weight of authority that when the owner has, by his own voluntary acts, clothed the sender with an apparent authority to act for him, then the carrier has a right to look to the owner for his reasonable charges and to hold a lien on the goods for the charges, and in judging of the authority we should apply the same principles of evidence that are applied to cases of agency generally. See *Lawson on Contracts of Carriers*, § 224; *York Company v. Central Railroad*, 3 Wall. 107; *Schneider v. Evans*, 25 Wis. 241, 265; *Mallory v. Burritt*, 1 E. D. Smith, 234.

In the present case the owner, by his agents at Shreveport, had placed the cotton in charge of a carrier to be carried by a certain route and to be forwarded by the usual lines of carriers. He had by this made them successively his agents for forwarding. By a mistake of one of them, in copying the bill of lading to send forward with the cotton, the word Chicopee was inserted as the place of destination when it should have been Providence. Who is to suffer for the mistake of the plaintiff's agent? Certainly not the Chicopee R. R. Co., who have not been in fault; nor the Providence and Worcester R. R. Co., who only paid to the Chicopee road the lawful charges.

Upon any other rule no railroad or steamboat line would be safe in taking goods from a truckman, even from one ordinarily employed by the owner, and the carrier could only protect himself by requiring payment in advance. And payment in advance to the first carrier for his own line would protect only that first carrier; and succeeding carriers would be obliged to take the same precaution.

There are, perhaps, some cases not easily reconcilable with any sound general rule, and where peculiar circumstances, not always reported, may have influenced the decision. The cases of *Everett v. Saltus*, 15 Wend. 474, also *Saltus v. Everett*, 20 Wend. 267, were cases of fraud in the owners' agent. And as to the distinction between the owner's liability for the fraud and his liability for the negligence of his agent, see *Wharton on Agency*, § 540 and § 476; see also *Caldwell v. Bartlett*, 3 Duer, 341.

If the Chicopee R. R. Co. had been in fault so that they would not have been entitled to freight from New York, the owner might

have refused to pay it, and might have replevied and tried the question of their right to it at Chicopee. But if, as seems to us, that company was not in fault, having taken the goods from a person or company clothed by the owner with possession and apparent authority, they were not obliged to give them up at Chicopee, except upon the payment of their lawful charges and advances.

If the first carrier has guaranteed a through rate, as he has done in this case, the owner may have his action against him in Shreveport; or he may have an action against the company whose clerk committed the blunder; or he might have replevied the cotton at Chicopee, and had the question decided in Massachusetts.

In this case the first carrier guaranteed the delivery of the cotton at Providence at a certain rate, and, as we have said, but for the mistake it would have been delivered there at about that rate. And it is very ingeniously argued, by the counsel for the plaintiff, that all the carriers subsequent to the first took the goods with full notice of this guarantee, and are therefore bound by it. But it is difficult to see how any road not connected with the first is bound by such a guarantee, even if knowing it.

It is further argued that as the Providence and Worcester R. R. Co. took the cotton with knowledge of the guarantee, and with knowledge that the cotton had gone out of its usual course, it should be estopped from denying a connecting arrangement for through transportation.

We cannot see that the Chicopee R. R. Co. was bound to know that the cotton was on the wrong route. The bags were indeed marked Providence, and B. F. Vaughan, of Providence, was to be notified. But they were to be controlled by the bill of lading, and by that the destination was Chicopee; and it would not have been unreasonable for them to suppose that the owner in Providence might have ordered the cotton to Chicopee for some purpose of his own. We cannot see that there was anything in this to excite suspicion or put them on their guard.

The cotton arrives at Chicopee, the place of its destination by the bill of lading which accompanied it. The owner is informed of it, as directed by the bill of lading. No person but the owner had any authority to send it further. But for the owner's direction the Chicopee R. R. Co. must have held it. They knew of no other destination. They had notice by the bill of lading that the owner had given no authority to send it to any other place. If, so warned, they had forwarded it and the owner had been damaged by it, e.g., if he had intended to sell the cotton at Chicopee, or to send it to some other place, they might have been liable for the damages.

They did as directed by the bill of lading, notified the owner and awaited his orders.

Judgment for defendant.

It is proposed in the following note to consider the question of the carrier's lien for freight as applied to railroad companies. The cases are by no means in harmony on this topic. It is therefore scarcely possible to indicate any general results without treating the authorities somewhat in detail.

Railroad companies, like all other common carriers, have a lien upon the goods transported by them for the amount of the freight. And it has been decided that where the goods have been delivered to an express company for carriage, and thus come into possession of the railroad company, said last-named company can assert its lien as against the owner. *Langworthy v. New York and Harlem R. Co.*, 2 E. D. Smith, 195.

This lien for freight is superior to and may be asserted as against the shipper's right of stoppage in transitu. *Rucker v. Donovan et al.*, 13 Kansas, 251.

Where a railroad company receives goods for transportation from one wrongfully in possession thereof, it cannot set up a lien for freight as against the real owner, even for freight paid to a previous carrier, by whom the owner has directed them to be transported. *Stevens v. Boston and Worc. R. Corp.*, 8 Gray, 262. In like manner where a railroad company receives goods from one who though rightfully in possession thereof has no authority to ship them, it cannot assert as against the owner a lien for freight.

Clark v. Lowell and Lawrence R. R. Co., 9 Gray, 281.

Where the owner of goods delivers them to a carrier for transportation through a number of separate but connecting lines, it is the general custom for each carrier to pay the back charges for freight, and the last carrier has a lien on the goods for the whole. *Schneider v. Evans*, 9 Am. L. Reg., N. S. 586; *Stevens v. Boston and Worcester R. Corp.*, 8 Gray, 262; *Potts v. New York and New England R. Co.*, 18 Rep. 15; *Travis et al. v. Thompson*, 37 Barb. 236; *Steamboat Virginia v. Kraft et al.*, 25 Mo. 76; *Wolf v. Hough*, 23 Kans. 659; *Briggs v. Boston and Lowell R. R. Co.*, 6 Allen, 246.

But the lien of the last carrier in such cases is exclusively for the charges of transportation.

Travis et al. v. Thompson, 37 Barb. 236. It does not cover advances made on demand of the consignee or the owners wholly foreign to and disconnected from costs of transportation.

Steamboat Virginia v. Kraft et al., 25 Mo. 76.

There is a line of cases which upholds this lien of the last carrier to a remarkable extent. So potent do they consider the force of the custom that if the last carrier takes bona fide in total ignorance of any special contract with or malfeasance by the prior carriers, he is entitled to assert his lien entirely irrespective of such special contract or malfeasance. Where, therefore, a railroad company, constituting the first of a line of connecting carriers receives goods for transportation guaranteeing that the freight should not exceed a certain amount, and subsequently the goods passed through the hands of several other carriers, the freight finally exceeding considerably the guaranteed sum, it was held that the last carrier in the series, who had taken the goods without any knowledge of the original contract, was entitled to a lien for the total amount of freight carried.

Schneider v. Evans, 9 Am. L. Reg. N. S. 586.

So where goods were shipped from Racine, Wisconsin, marked Williamstown, Mass., and while en route the name "Williamstown" was by mistake changed to "Wilmington," in consequence of which the goods were sent to that point, it was held that the last carrier was entitled to a lien for all the freight earned by it in transporting the goods to Wilmington, and also for all back freight paid by it to preceding carriers.

Briggs v. Boston and Lowell R. R. Co., 6 Allen, 246.

To a somewhat similar effect is the case of *Wolf v. Hough*, 23 Kansas, 659.

Here a shipper shipped certain goods from Roselle, Ill., a station on the Chicago and Pacific R. Co., to Girard, Kansas. An agent of that railroad received the goods at Roselle, and took from the shipper an amount which he said was sufficient to pay the charges through, giving a receipt on which was endorsed, "Freight charges paid through to Girard." The Mo. R., Ft. Scott and Gulf R. Co. received the goods at Kansas City, and carried them over its road to their destination. The agent and officers of said company had no knowledge of the action of the agent of the first R. Co. at Roselle. Nor had said railroad company last named any agreement or arrangement with the first-named road relative to the transportation of freight. The amount of freight on the Mo. Riv., Ft. Scott and Gulf R. being only partly paid, *held*, that said road had a lien on the goods for its unpaid charges.

To the same class of cases belong those which hold that a common carrier, constituting one of a connected line, may assert a lien for all freight earned, and back freight paid, even though the goods in question may have been damaged by previous carriers. *Bouman v. Hilton*, 11 Ohio, 808; *Bissell v. Price*, 16 Ill. 408.

Cf. Also, the principal case upon this point.

This whole line of cases is reviewed with disapprobation by Judge Redfield in an able note in 9 Am. Law Reg., N. S. 589, which concludes as follows:

"In short, it seems to us, it must be regarded as entirely well settled that the first carrier of goods in a line consisting of successive carriers is in no sense the implied agent of the owner of the goods, but that he is the implied agent of the line of carriers, and his contract will bind them, whether made known to the owner or not. If not made to them, it is the fault of their own agent, and they cannot visit it upon the other party, unless there is some fraudulent concealment on his part."

And there are some cases to be found which take this view of the law.

Where, therefore, freight was paid in advance to the first carrier, and upon the goods being forwarded, a subsequent carrier having no notice of the prior payment, advanced the full amount of the back freight, it was held that such subsequent carrier could not assert any lien therefor. *Fitch et al. v. Newberry et al.*, 1 Douglas, 6 Mich. 1.

A similar conclusion was reached in *Jones v. Boston and Albany R. R. Co.*, 68 Maine, 188. There the plaintiff forwarded certain wheat from Delavan, Ohio, to Springvale, Maine. By mistake either of the shipper or the railway company the wheat was billed to Springvale, N. H., and by mistake, while en route, the bill was again changed to Springfield, N. H. By the terms of the contract of transportation the wheat was to be carried via East Boston. On its arrival at that point via the company defendant's road it was forwarded to Springfield, N. H. There being no station at that point, it was taken to the nearest station to that town, and there stored, and subsequently the consignee not being found returned to East Boston. There the consignee claimed it, tendering only the freight from Delavan to East Boston. The railroad company demanded in addition the freight towards Springfield, N. H., and return, which it had paid. It was held, however, not to be entitled to this sum, and, as a matter of course, to have no lien therefor.

As has already been said, the lien of the carrier is generally confined strictly to the charges of transportation. Sometimes, however, this rule is varied by the terms of bill of lading. Where, therefore, a steamboat company undertook to transport goods, and to deliver the same on payment of "freight and charges," and while en route the vessel on which the goods were stored sank, obliging the company to pay salvage, it was held that said company had a lien upon the goods, as well for the freight carried as for a proportionate part of the salvage. *Chicago and S. W. R. R. Co. v. N. W. U. P. Co.*, 38 Iowa, 377.

Generally, however, the rule holds good. Where, therefore, goods are

left in the cars of the company transporting the same some time after they have arrived at their destination, thus occasioning expense and inconvenience to the carrier, it has been held that said company, although it has a right to compensation in the nature of demurrage from the consignee, cannot assert any lien for such compensation. *Crommelin v. N. Y. and Harlem R. Co.*, 4 Keyes (N. Y.), 90.

And even where there is an express agreement between the company and the consignee, that the former shall be entitled to a certain compensation per diem for the use of the cars in this manner, the same result follows. *Crommelin v. N. Y. and Harlem R. Co.*, 10 Bosw. 77.

Where the goods have once been delivered by the company to the consignee, its lien for freight is of course gone. *Bigelow v. Heaton*, 4 Denio, 496.

What amounts to a delivery is sometimes a nice and difficult question. Where a railroad company had contracted at the end of its line to unload goods on the level, it was held that as soon as they were thus unloaded there had been a constructive delivery, and the carrier's lien was gone.

Rememan v. C. C. and B. R. R. Co., 51 Iowa, 338.

Where a railroad company delivers part of the goods without exacting freight charges, it does not waive its lien upon the residue unless such an intent be clearly shown. *N. H. and N. R. Co. v. Campbell*, 128 Mass. 104.

It may on the contrary assert its lien on such residue for the freight earned on the whole. *Potts v. New York and New Eng. R. Co.*, 13 Rep. 15.

Where several cargoes of coal were delivered at a railroad company's wharf, transported over the line and put together in large bins at the terminus, and subsequently portions thereof were taken away by the consignee without paying freight, it was held that the railroad company was not precluded from asserting its lien on the residue for the freight carried in the transportation of all the cargoes. *Lane et al. v. Old Colony and Fall River R. Co.*, 14 Allen, 143.

Where a carrier contracts to take freight on a round trip, putting out and taking on goods en route, as the employer pleases, he has a lien at the expiration of the trip upon all the goods then actually on board for the freight carried. *Fuller et al. v. Bradley*, 25 Pa. St. 120.

A railroad company cannot enforce its lien for freight by selling the goods. If it does so it will be held liable for conversion. *Jones v. Boston and Albany R. R. Co.*, 63 Me. 188; *Briggs v. Boston and Lowell R. Co.*, 6 Allen, 246.

The measure of damages will be, however, the value of the goods in the market, deducting the amount of the lien. *Briggs v. Boston and Lowell R. Co.*, 6 Allen, 246.

THE CHICAGO AND NORTHWESTERN RY. CO.

v.

THE UNITED STATES.

(Advance Case, U. S. Supreme Court. March 6, 1882.)

The deductions under the thirteenth section of the act of Congress of July 12, 1876, and under the act of June 17, 1878, of the compensation to be paid for carrying the mails, cannot be made against a company whose railroad has been the subject of a land grant, when the service had been rendered during the term of a written contract for four years made by the Postmaster-General, and which had not terminated when the acts making the reductions took effect.

The performance by the railroad company of the service imposed upon it by its contract, protesting against the reduction of compensation, is not a waiver of any rights under the contract.

APPEAL from the Court of Claims.

J. F. Farnsworth, for appellant.

S. F. Phillips, Solicitor-General, for appellees.

MATTHEWS, J.—The appellant owns and operates lines of railroad, of which parts were constructed by companies which severally received grants of public lands from the United States to aid in their construction.

The condition attached to these grants was: "That the United States mail shall be transported over such roads, under the direction of the Post-office Department, at such price as Congress may by law direct; provided that until such price is fixed by law the Postmaster-General shall have the power to determine the same." Act May 15, 1856, 11 Stat. at L., p. 9, sec. 5; act of June 3, 1856, *Id.*, p. 20, sec. 5.

In September, 1875, the appellant entered into three contracts in writing with the United States, acting by the Postmaster-General, each for conveying the mail on a certain route numbered and described therein, over a part of its line, for four years from July 1, 1875, at a fixed price per annum, being at the rate of a specified sum per mile per annum. These contracts were in the usual form prescribed by the department, and specified the services to be performed, among other things requiring the company to convey free of charge all mail-bags and post-office blanks, and all accredited agents of the department free of charge, and to collect from postmasters on the route quarterly balances due from them to the government, and account for the same; and stipulated for the payment of fines to be imposed upon the company for certain defaults. The ninth clause of each is as follows:

"That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued."

These contracts were entered into by the Postmaster-General under the authority of the following sections of the Revised Statutes:

"Sec. 3942. The Postmaster-General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor.

"Sec. 3946. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

The prices agreed to be paid were in conformity with the provisions of section 1 of the act of March 3, 1873, ch. 231, 17 Stat. at L. 558, being section 4002 of the Revised Statutes.

On the 12th of July, 1876, in the act making appropriations for the service of the Post-office Department, etc., Congress inserted the following provision, viz.:

"Provided, That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the 1st day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post-office Department for the fiscal year ending June 30, 1874, and for other purposes,' approved March 3, 1873, for the transportation of mails on the basis of the average weight."

"Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such prices as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act." *Richardson's Supp.*, 224, 226; 19 Stat. at L., pp. 79, 82.

On August 18, 1876, the Postmaster-General issued an order, which was communicated to the appellant, reciting the foregoing proviso in the act of July 12, 1876, relative to the ten per cent deduction, and stating that the assistant attorney-general of the Post-office Department had advised, with reference to railway service performed under contract with the government, "that when the contract has been made in due form of law with a railroad company for the transportation of the mails for a term not yet expired, such contract is not affected" by the proviso.

And on October 20, 1876, the Postmaster-General issued another circular, reciting the proviso and also section 13 of the act of July 12, 1876, and informing the appellant that a reduction would be made for mail service performed after July 1, 1876, upon those routes over the roads aided by land grants, of the amount of twenty per cent as required by the thirteenth section of the act.

To this notice the appellant replied with a protest against the proposed reduction as in violation of its contract.

The act of Congress making appropriations for the service of the Post-office Department, etc., approved June 17, 1878, contained this proviso:

"That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight, fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post-office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

On July 29, 1878, the Post-office Department notified the appellant that there would be a reduction of five per cent from its compensation, under this act, against which the appellant promptly protested.

The appellant performed all the service required by its contracts during the entire period covered by them; but deductions from the contract rates were made, in accordance with the notices of the department, at each settlement, amounting in the aggregate to \$83,310.91, for which the appellant, on July 14, 1879, after the contracts had been completely performed on its part, brought the present suit. The Court of Claims rendered judgment in its favor for the sum of \$876, being the amount of the deductions for the services rendered from July 1 to July 12, 1876, the latter being the date when the first act, under which they were made, took effect.

From this judgment an appeal is prosecuted on behalf of the railroad company.

The power of Congress to direct by law the price at which the mail service here in question should be performed was expressly reserved as a condition of the land grants which formed, in part, their motive and consideration. But when Congress authorized the Postmaster-General to fix the price by contract, within specified maximum rates, and for a period of four years, it was an agreement on the part of the United States that the stipulated compensation

should not be withheld during that period, which it could not refuse to perform without a breach of the public faith. The contract was an exercise of the reserved power, with an added obligation not to exercise it otherwise for the period agreed on, and we are unable to perceive any ground on which its validity can be denied. The stipulations in the contract on the part of the railroad company transcend its necessary obligations growing out of the acceptance of the conditions of the land grant, and furnish a sufficient and distinct consideration for the promise of the government not to disturb the rates of the contract during the period of its existence, for there are several stipulations collateral to the service to be rendered, which the government could not have exacted as due by previous obligation and irrespective of the assent of the company.

The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might by a repeal of the contract expressly stipulated restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself.

Some claim of this kind is put forward in the present case, and the ninth clause in the contracts is referred to as containing such a reservation. Clearly this confers power upon the Postmaster-General to discontinue or curtail the service, in whole or in part, he allowing, as an indemnity to the contractor, a month's extra pay on the amount of service dispensed with, and a pro-rata compensation for that retained and continued. But this is not a power to reduce the compensation for the full service performed, or to alter the terms of the contract. It is true that under this reservation the Postmaster-General would be authorized, to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself, on making the indemnity specified. But in that event, the contract being at an end, the company would no longer be under any obligation except that imposed by the original conditions accepted with the land grants, and the government could rightfully impose upon it no others. There is, therefore, in the contract itself no power reserved to alter the amount of compensation, except by a reduction of the required service. If the government insists upon full performance of that, it can be only upon the terms fixed by the contract.

It is argued, however, on the part of the government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the acts of Congress of July 12, 1876, and of June 17, 1878, and the notices from the Post-office Department that the reductions assumed to be contemplated by them would be insisted on, the fact that they were made in the adjustment of accounts, and that the railroad company, notwithstanding its protest, continued to perform the service, had the effect to supersede the contracts of 1875 and substitute new ones in their stead, on the basis of the reduced compensation. Such, in substance, was the view taken by the Court of Claims.

In our opinion that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the railroad company. They contained within themselves a mode for lessening, or, if deemed best, for discontinuing entirely, the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect the relation between the parties was that of perfect equality in right.

If, in these circumstances, the government not merely accepted but demanded the performance of the contract service, the presumption is that it meant to pay the contract price. It would require positive and express words to negative that presumption. We find none such in the statutes of 1876 and 1878. Their language may be well satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter to be entered into. They do not legitimately apply to contracts then existing whose terms had not expired, such as those in the present case.

Such was the opinion of the Attorney-General at the time, to whom the Postmaster-General submitted one of the contracts on which this suit is founded for his opinion whether it was affected by the act of July 12, 1876. He replied in the negative, saying:

"In my opinion Congress did not intend it to have this effect. The contracts, of which that with the Chicago and Northwestern Railway submitted by you for inspection is a sample, were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages. The act of July 12, 1876,

was apparently passed with a view to reduce the public expenses. But it would not have this effect if an equivalent to the reduction of pay were recoverable under the name of damages, with perhaps the expenses of litigation added. Therefore I conclude that the construction most consistent with justice and fair dealing is the true one, viz., that as to existing contracts the rate remains as stipulated in the agreement during the term therein mentioned, but that in those cases where no contract prevailed the reduction should be made." (Opinion of Attorney-General Taft, 15 Opinions, etc., 182.)

Of course, if it was not the intention of the acts of Congress referred to to affect the contracts of the appellant, the erroneous interpretation of them by the Postmaster-General, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself; and the performance by the railroad company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals—and that whether it had protested against the erroneous construction of the law or not. For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so without prejudice to its lawful claims, leaving the ultimate right to future and final decision. It was not the case of a voluntary payment of an illegal exaction, where the maxim *consensus tollit errorem* prevents a recovery; because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria*. But here the service was to be performed at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either.

We are of opinion, for these reasons, that the Court of Claims should have rendered judgment in favor of the appellant for its whole claim. The judgment appealed from is accordingly reversed, and the cause remanded with instructions to render a judgment in conformity with this opinion.

Reversed.

UNION PACIFIC R. R. Co.

v.

THE UNITED STATES.

(104 *U. S. Reports*, 662. *October*, 1881.)

The sixth section of the act of Congress of July 1, 1862, c. 120, incorporating the Union Pacific R. R. Co. (12 Stat. 489), constitutes a contract between the United States and the company, whereunder the latter, for its service in transporting upon its road, from Jan. 1, 1876, to Oct. 1, 1877, the mails, and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service.

The contract is not affected by the sections of the Revised Statutes declaring that the Postmaster-General may fix the rate for such service when performed by railroad companies to which Congress granted aid, and he had no authority to insist that it was not binding upon the United States.

The company, having been required to perform the contract, lost no rights by a compliance therewith, as it protested against and rejected all illegal conditions attached to the requirement.

APPEAL from the Court of Claims.

This was an action brought by the Union Pacific R. R. Co. against the United States to recover compensation alleged to be due for services rendered from Jan. 1, 1876, to Sept. 30, 1877, in the transportation of the mails over its road, and of the employees accompanying them, who were charged with sorting, distributing, and delivering them.

The United States traversed the petition of the company, and set up a counterclaim for five per cent upon the amount of the net earnings of the company's road from Nov. 6, 1875, to Nov. 6, 1877.

The Court of Claims was of opinion that the compensation for that service was not to be determined by reference to the act of July 1, 1862, c. 120, but by the general laws regulating the compensation for similar service by other railway companies. It therefore adjudged and decreed as follows: That whereas the sum of \$618,910.54 has been found to be due to the claimant from the defendants for the services alleged in its petition, of which it is entitled to recover a moiety, to wit, the sum of \$309,455.27, pursuant to the act of 2d July, 1864, c. 216; and whereas the sum of \$682,032.18 has been found to be due from the claimant to the defendants on the matters alleged in their plea of counterclaim,—therefore the said moiety of \$309,455.27 be set off against and deducted from the said sum found to be due the defendants, and the defendants recover from the claimant the balance remaining, to wit, the sum of \$372,576.91.

The company thereupon appealed.
 Mr. Sidney Bartlett, for the appellant.
 The Solicitor-General, for the United States.

Mr. Justice MATTHEWS delivered the opinion of the court.

The controversy in the Court of Claims related to the amount of compensation to which the Union Pacific R. R. Co. is entitled for postal services from Jan. 1, 1876, to Oct. 1, 1877. The claim is based upon the sixth section of the act of July 1, 1862, c. 120 (12 Stat. 489), which reads as follows :

"Sec. 6. And be it further enacted, that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad, for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The contention on the part of the appellant is, that this section of the statute is a contract between the government and the company, whereby the former bound itself to furnish the employment specified, and the latter to render the corresponding services; that this contract has not been abrogated or modified by subsequent legislation, and regulates the rate of compensation for the services rendered during the period named; that the agreed rates of compensation are to be equal to those paid by private parties for the same kind of service; and that the compensation received by the appellant from private parties for the transportation of matter in express cars furnishes the true standard of that comparison.

We have no hesitation in conceding that the section quoted constitutes a contract between the United States and the railroad company; but we are unable to find in it an absolute obligation on the part of the government to employ the railroad in the described services. It reserves the right so to do at its option; but it does not stipulate that it will do so.

On this point we agree with the opinion of the Court of Claims, and adopt its language, as follows :

"The section means, we think, that the company shall transport the government's mails, munitions, troops, etc., whenever required so to do, and that the government at all times shall have the preference over private parties; but that the transportation in all cases

shall be done at fair and reasonable rates, which in no case (of preference or otherwise) shall exceed the rates paid by any private party for the same kind of service, while in all cases, even where the ordinary rates are fair and reasonable, per se, the government shall have the benefit of those exceptional reductions of rate which railroads frequently make, sometimes as a matter of policy and sometimes as a matter of favor."

But it is contended on the part of the government that this contract does not apply to the services, the compensation for which is in question, because prior to the time when they were rendered it had been terminated by subsequent legislation. The legislation which it is claimed has that effect is embraced in tit. 46, c. 10, Rev. Stats., secs. 3997-4005, inclusive, regulating the subject of the railway postal service.

Section 4002, Rev. Stat., fixes a scale of maximum rates, graded according to the average weight of the mails carried, according to which the Postmaster-General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of mails on said railroad routes. And it was in accordance with a readjustment based on these rates that, in the present case, the government insisted that the appellant was bound to conform its claims, and the Court of Claims so adjudged.

Section 4001 provides that "all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may provide; and until such price is fixed by law, the Postmaster-General may fix the rate of compensation."

The substance of this provision, as is pointed out by the counsel for the appellant, first appeared in the act of Sept. 20, 1850, c. 61 (9 Stat. 466), granting the right of way and public lands to the State of Illinois, in aid of the construction of the Central R. R. said to be the first land grant to aid in the construction of a railroad. The grant was accompanied by the condition that the "United States mail shall at all times be transported on said railroad, under the direction of the Post-office Department, at such prices as the Congress may by law direct." All subsequent similar grants to such corporations were coupled with the same condition. Prior to 1850, the legislation of Congress had regard only to the transportation of the mails over railways established in the various States to which no government grants or subsidies had been made; and it merely enabled the Postmaster-General to contract for the service, if terms could be made with the corporations, and, if not, to resort to the previous methods of transportation. The provision in the sixth section of the act of 1862—the Pacific R. R. Act—is the first of its kind. The clause in sec. 4001, authorizing the Postmaster-General to fix the rate of compensation to land-grant roads, in the absence of a price fixed by law, was first added to the

general postal legislation by sec. 214 of the act of June 5, 1872, c. 335 (17 Stat. 309), which purports to be "An Act to revise, consolidate, and amend the statutes relating to the Post-office Department," and is substantially a codification of the provisions of the law then in force relating to the subject. From that act it was transferred into the Revised Statutes in the form as quoted.

It is certainly true that these provisions, in their primary intention, did not apply to the appellant, for it did not then exist; and when it came afterwards into being, by virtue of the act of 1862, it did so with the special legislative contract in the sixth section of its charter, which constituted it a land-grant railroad company, sui generis, differing at least in that respect from those previously provided for; and these diverse rules as to compensation for service rendered for the government continued thenceforth to coexist without conflict. No change of a substantial character was made in the provisions enacted prior to 1862, either by the consolidated act of 1872 or the Revised Statutes, and there is not, therefore, any ground for the inference of a change of the legislative intention that might be drawn from a significant change of language. There is consequently no present inconsistency between the existing provisions of the Revised Statutes, as applicable to the land-grant roads within their purview, and the continued existence of the contract contained in the sixth section of the appellant's charter.

The legislation referred to furnishes, therefore, no evidence of any intention on the part of Congress to alter the relation between the appellant and the government, established by the sixth section of the act of 1862, and we are of the opinion that the company is entitled, under its provisions, for the services rendered during the period covered by the present claim, to fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services. To what extent and upon what considerations Congress has the power to make such change, under the reservations in the act, in a case where it manifests an intention to do so, is a question which does not arise in this suit, and has not been considered.

This conclusion cannot be reconciled with the view taken by the Court of Claims, that the government having the option under its contract to employ the appellant or not in its postal service, had the right to prescribe the terms on which it would do so; that the sections referred to in the Revised Statutes contain the terms so prescribed, and that the appellant, having performed the service with notice of the law, must be taken to have assented to those terms, notwithstanding its protest, in which it claimed the benefit of its contract as still in force. For the Revised Statutes, as we have found, do not apply, and, therefore, did not alter the contract, and gave to the Postmaster-General no authority to insist that it was

not binding; and as the company, by its terms, was bound to render the service, if required, its compliance cannot be regarded as a waiver of any of its rights. The service cannot be treated as voluntary, in the sense of submission to exactions believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for according to the terms of the obligation, which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights. This it did.

In computing the amount of compensation to which it claimed to be entitled, under its contract for the services performed, the appellant insisted upon the adoption of the rates charged by it to private parties for goods carried in express cars, as being the only service of the same kind, and so furnishing the criterion of its compensation. In the agreed statement of facts two other modes of computation were introduced: one, including with express matter, cars transporting fruit, fish, and perishable articles hauled in passenger trains; the other, adopting the charges upon the latter, exclusive of the express matter, as furnishing alternatives for the judgment of the court in determining the amount due according to the contract.

Viewed as a question of law, it is impossible to say that either of these rules of computation is the true one. The question is, what is a fair and reasonable rate of compensation? and, in reference to that we adopt the opinion of the Court of Claims, as thus expressed:

"Construing the statute as we do, we think the court would not be limited, in an action where it was compelled to estimate damages, to the rates charged by the company to private parties for a single kind of similar service. We think that a court or jury would be authorized to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the cost and running expenses no greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of 'fair and reasonable rates of compensation.' The reports of the auditor of railroad accounts show what rates of compensation the claimant has received for passenger cars, but in the determination of the case we do not feel at liberty to go outside of the agreed statement of facts upon which it was submitted."

The case was not submitted to the Court of Claims in a way to enable it to determine the question of fact; and upon a re-trial, if the parties do not agree upon the amount or upon the rule of computation, the compensation, at fair and reasonable rates, must

be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service.

It will be just and necessary to include in that estimate and finding an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service, to be paid for, necessarily, at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the government, for which, as an entirety, the compensation should be made, at fair and reasonable rates, according to, and subject only to, the limitation required by the sixth section of the act of 1862.

To this end, for the reasons assigned, the judgment of the Court of Claims will be reversed, and the cause remanded with instructions to proceed therein in conformity with this opinion; and it is so ordered.

THE HOUSTON AND T. O. R. R. Co.

v.

VICTORIA C. BURKE.

(55 Texas Reports, 838. June 31, 1881.)

Though, under the Revised Statutes (arts. 1215, 1219, 1220), the citation to a defendant should state, amongst other things, the nature of the plaintiff's demand, it was not designed to supply in this respect the place of the petition; a general statement notifying defendant of the character of plaintiff's demand, and avoiding any attempt at detail is sufficient.

In a suit against an incorporated company, citation may be served upon a local agent representing the company in the county in which such suit may be brought (R. S., 1228). A petition alleged that a defendant incorporated company had an office "for the transaction of business as a common carrier in the city of Austin, Travis county, Texas, at which place the agent of said company is Robert S. Collins." The suit was brought in Travis county. *Held*, that service of citation on Robert S. Collins was sufficient to hold the defendant to answer the petition, and that no judicial ascertainment of the agency was required to authorize a judgment by default.

When service of citation is made upon the agent of an incorporated company who resides in the county where the suit is brought, the defendant company, though its principal office may be elsewhere, is not entitled to be served with a certified copy of the petition.

See opinion for facts stated in motion and affidavits to set aside a judgment by default, which so far excused a failure to answer, that, if accompanied with a showing of a meritorious and valid defence, should have authorized the granting of the motion.

A defendant against whom a judgment by default has been rendered cannot complain that plaintiff's claim for damages was excessive, if, after

overruling his application to set aside the default, the court permitted the defendant to introduce evidence to show the true extent of damage sustained.

From considerations of public policy, common carriers are made liable under the statute (R. S., art. 278), and under the decisions of the courts of Texas, as at common law, for all losses not occasioned by the act of God or the public enemy; and any exceptions or special contract seeking to vary that liability are invalid. But if the shipper practises a fraud on the carrier by fraudulently concealing, either through his acts or omissions, the value of the article shipped, the carrier is discharged.

See case for facts, stated in an application to set aside a judgment by default, which were held insufficient to show such a valid, meritorious defence as to authorize the granting of the application.

In a suit for damages resulting from the loss by a common carrier of a family portrait, a member of the family was permitted to testify that he knew the value (stating it) of the painting from family tradition and from his deceased father. Aside from this, artists testified that the painting was worth that amount, though other witnesses swore to a less value. The court in the charge authorized the jury to look to the original cost, etc., in determining value. *Held*,

(1) That the error in permitting the hearsay evidence required a reversal of the judgment, exception being taken in time.

(2) Whenever improper evidence has been admitted which may have influenced improperly a jury, the error requires a reversal of the judgment.

Notice of objections to the manner or form of taking depositions is in time if given before both parties have announced ready for trial. Until then the trial of the suit has not, in contemplation of the statute, commenced. R. S., art. 2235.

It is error to permit a witness to give his opinion as to the measure of damages, that being matter of law.

A witness may, while on the witness stand, refresh his recollection as to the value of specific articles by referring to a bill of particulars, known to him to be a copy of a correct memorandum of their value, made by himself.

In a suit to recover damages for the loss or destruction of family portraits, which have no market value, the jury may look to their original cost and to the probable cost of reproducing and replacing the same.

APPEAL FROM TRAVIS.

The opinion sufficiently states the case.

Walton, Green & Hill and George Goldthwaite, for appellant.

John B. Rector, for appellee.

I. The citation states the nature of plaintiff's demand. R. S., art. 1215; Wade on Notice, § 1156; Hughes v. Osborne, 42 Ind. 450.

II. The allegations in plaintiff's petition are sufficient to hold defendant to answer by service on Robert S. Collins. The petition says, "That the defendant, the said Houston and Texas Central Railway Company, is a body corporate, created by the legislature of the state of Texas, entitled an act, etc., and that the principal office of said company is in the city of Houston, Harris county, Texas, and that said company has an office for the transaction of its business as a common carrier in the city of Austin, Travis county, Texas, at which place the agent of said company is

Robert S. Collins." R. S., art. 1223; Wade on Notice, §§ 1310, 1311; M. K. & T. R. R. v. Crowe, 9 Kan. 496; State v. Han. & St. Jo. R. R., 51 Mo. 532.

III. The agency of Robert S. Collins was judicially ascertained. There was a judgment by default in the case.

IV. Defendant was not entitled to a copy of plaintiff's petition accompanying citation. R. S., arts. 1216, 1219, 1220, 1223.

V. The defendant was guilty of such negligence in failing to answer plaintiff's petition as justified the court in refusing to set aside the judgment by default. *Foster v. Martin*, 20 Tex. 119; *Watson v. Newsham*, 17 Tex. 437; *Freeman v. Neyland*, 23 Tex. 529; *Ables v. Donley*, 8 Tex. 336; *Power v. Gillespie*, 27 Tex. 370; *Houston v. Jennings*, 12 Tex. 487; *Clute v. Ewing*, 21 Tex. 677; *Sayles' Treatise*, § 841.

VI. The defendant in its application to set aside the judgment by default failed to show that it had a good defence to plaintiff's cause of action. *Foster v. Martin*, 20 Tex. 119; *Cook v. Phillips*, 18 Tex. 31; *Wright v. Thomas*, 6 Tex. 421; *Cochran v. Middleton*, 13 Tex. 275; *Aldridge v. Mardoff*, 32 Tex. 297; *Scrivner v. Malone*, 30 Tex. 773. As to exemptions in bill of lading from liability, how far binding, see R. S., art. 278; *Lawson on Carriers*, §§ 29, 92, 95; *Galt v. Adams Ex. Co.*, reported in *Lawson on Carriers*, 426, 427, etc.; the N. Y. Cent. and Hudson River R. R. Co. v. Trauloff, reported in *Thompson on Carriers of Passengers*, 502, 503, etc.; *Hollister v. Nowlen*, 19 Wend. 234; S. C., *Thompson on Car.* 489; *Levoise v. Gale*, 17 La. Ann. 305; 8 Cent. Law Jour. 291, 292, 293; *Boskowitz v. Adams Ex. Co.*, 9 Cent. Law Jour. 389.

VII. An application to set aside a judgment by default and permit the defendant to answer should show that there is a good defence, and should also show good cause or excuse for not pleading it at the proper time.

VIII. The bill of lading on which defendant rests its showing of a meritorious defence was not a contract between the shipper and carrier, and its exemptions from liability of the latter cannot bind the shipper. *Lawson on Contracts of Carriers*, §§ 114, 105, 219, 95, pp. 97, 29, note 32; *Galt v. Adams Express Co.*, reported in *Lawson's Carriers*, 427; 2 *Greenleaf on Evidence*, § 216; *Angell on Carriers*, § 247; *Redfield American Railway Cases*, 2d ed. 268, 269; *Levoise v. Gale*, 17 La. Ann. 305; 5 Cent. Law Jour. 134, 135; 8 Cent. Law Jour. 291, 292.

IX. The bill of lading on which defendant rests its showing of a meritorious defence is contrary to the statutes and public policy of the state of Texas, and invalid. R. S., art. 278; *Houston and Texas Central Railroad v. John A. Peel*, decided by Court of Appeals at Galveston term, 1881; *Heaton & Bro. v. Morgan's Louisiana and Texas Railroad and Steamship Co.*, vol. 4, No. 24,

Texas Law Journal; *Crosby v. Houston*, 1 Tex. 203; *Rohrer on Inter-State Law*, 49; *Anderson v. Pond*, 13 Pet. 65; *Story on Conflict of Laws*, § 304a.

X. The motion of appellant, with affidavits thereto attached, asking to set aside the judgment by default, did not attempt to meet the charge of the petition that the goods were lost through the carelessness of defendant. The petition in both counts charges that appellee's goods and property were burned through the carelessness of defendant while in its custody as a common carrier. In defendant's motion to set aside the judgment by default, there is no attempt to show that the goods were not lost through the carelessness of defendant. 2 *Redfield's American Railway Cases*, 268; *id.*, 2d ed. 263, 264; *Lawson on Carriers*, § 133, note 33; §§ 132, 28, 29; *Galt v. Adams Express Co.* 427, reported by *Lawson on Carriers*; 2 *Redfield on the Law of Railways*, 5th ed., § 178, divisions 5, 11, 12, thereof; *Bank of Kentucky v. Adams Express Co.*, 4 Cent. Law Jour. 35; *Kerby et al. v. Adams Express Co.*, reported in 3 Cent. Law Jour. 435; *Boskowitz et al. v. Adams Express Co.*, reported in 8 Cent. Law Jour. 389; 8 Cent. Law Jour. 291.

XI. The court did not err in permitting plaintiff to refer to her bill of particulars to refresh her memory while she was answering questions propounded by her counsel. 2 *Phillips on Evidence*, 915, 926 (10th English ed.); *Flato v. Brod & Henmi*, 37 Tex. 735; 1 *Greenl. on Ev.*, §§ 436-438; 1 *Starkie*, 184.

XII. The admission of improper evidence, cumulative in its nature, will not authorize a reversal of the judgment, when there was sufficient competent evidence before the jury to warrant the verdict. *Pridgen v. Hill*, 12 Tex. 378; *Mercer v. Hall*, 2 Tex. 287; *Beaty v. Whitaker*, 23 Tex. 529; *Johnson v. Brown*, 51 Tex. 65.

GOULD, ASSOCIATE JUSTICE.—This suit was instituted by Mrs. V. C. Burke, September 13, 1880, to recover of the railway company damages for the loss and destruction of certain paintings, jewelry, clothing, furniture and household effects, shipped by her at New Orleans, La., to be carried to Austin, Texas, under a contract made at New Orleans with a connecting line and agent of the appellant railway company, by the terms of which the latter agreed to carry said property from Houston, Harris county, to Austin. The property shipped was stated in detail, with values aggregating as follows: Paintings, \$8510; jewelry, \$2320; clothing, \$6081; furniture, household effects, etc., \$11,492.50. Total, \$28,403.50.

The petition stated "that said company has an office for the transaction of its business as a common carrier in the city of Austin, Travis county, Texas, at which place the agent of said company is Robert S. Collins." On this petition citation issued and was

served September 20th, on Robert S. Collins, by delivery of a copy thereof, the citation stating the nature of the demand set out in plaintiff's petition to be "a prayer for judgment in favor of said plaintiff against said defendant for \$28,403.50 damages, on account of the loss by defendant of the goods and property of said plaintiff, as will more fully appear by plaintiff's original petition on file." On October 8th there was a judgment by default and a writ of inquiry awarded. Two applications to set aside the default were made and overruled during the term, the defendant being, however, allowed to introduce evidence as to the quantity and value of property shipped, as though no default had been taken; the result of the trial being a verdict and judgment for plaintiff for \$20,500.

The questions presented in this court are numerous, but may be classed under three heads: 1st. The sufficiency of the citation and service. 2d. The sufficiency of the showings to set aside the default. 3d. Various rulings of the court on questions of evidence and practice, and in its charge, alleged to be erroneous.

The Revised Statutes require the citation to state "the nature of the plaintiff's demand," and provide, where the citation is served within the county in which the suit is pending, that it may be executed by delivering to the defendant a true copy of the citation; but where served without the county, directs that "the officer shall also deliver to the defendants, and each of them, in person, the certified copy of the petition accompanying the citation." R. S., arts. 1215, 1219, 1220.

It is objected that the citation does not state the nature of plaintiff's demand. We do not think the statute designs the citation to supply the place of the petition, or that it should state the nature of the demand otherwise than in a general way, avoiding any attempt at details, other than those prescribed. It should state "the date of the filing of plaintiff's petition, the file-number of the suit, the names of the parties and the nature of the plaintiff's demand;" the last to be stated sufficiently to notify defendant of the character of the demand against him. It would be unfortunate if citations could be objected to like a petition; and anything approaching strictness in requiring the nature of the demand to be set out with fulness and accuracy of detail would lead to danger of such a result. The statement in the citation we are considering is meagre, but we cannot say that it was insufficient.

In suits against incorporated companies, the statute says that the citation "may be served . . . upon the local agent representing such company or association in the county in which suit is brought." R. S., art. 1223. In our opinion, it sufficiently appears from the averments of the petition that Robert S. Collins was the local agent of the company in Travis county, although the petition does not follow the language of the statute.

The further point is raised that there was no judicial ascertainment of the agency of said Collins. The answer is, that there is no practice prevailing in this state requiring anything further to appear to show the agency than does in this case.

The final objection to the service, that "defendant was entitled to a copy of plaintiff's petition accompanying the citation," is answered by the fact that this service was had in the county in which the suit was pending, and in this case the statute does not require service of anything but "a true copy of the citation." R. S., art. 1219.

Our conclusion on this branch of the case is, that the defendant was properly cited.

On the third day after the default defendant filed a motion to set aside the judgment, supported by affidavits, from which it appears that, according to the regulations of the company, Collins should have forwarded the citation to the vice-president at the general office at Houston, but by mistake forwarded it to the general freight agent at that place. That Waldo, the freight agent, was temporarily absent from September 12 till October 9; and when the citation reached his office about September 22, it was placed in a pigeon-hole by a clerk, and there remained until after the default; that by reason of the mistake, and the absence of Waldo, no officer charged with the management of its general business had any information of the service of citation in this suit; that the claim of plaintiff had been presented in the latter part of June, and the same had been under investigation by Waldo, in the line of whose duties said business was, and information had been obtained that the claim was excessive and evidence could be adduced to that effect.

Beside the charge, made on information that the claim was exaggerated and unjust, the motion showed that the bill of lading given at New-Orleans by the connecting line, Morgan's Louisiana R. R. and Steamship Co., for itself and the Houston and Texas Central R. R., showed a contract at special rates, \$110 for lot, and contained the following: "It is also stipulated that the several lines or companies named in this bill shall not be liable for loss or damage from breakages, etc. Nor shall they be held responsible for gold, silver or precious stones, metals, jewelry or treasures of any kind, unless bills of lading are signed therefor, in which the actual value is stated. It is further expressly stipulated that the acceptance of the bill of lading recognizes the same as a contract binding both carrier and shipper." The bill of lading shows the shipment of one piano, five trunks merchandise, fifteen boxes sundries, four boxes shrubbery, three boxes marble, three barrels general ware, etc., including numerous articles of furniture. In connection with its motion, defendant tendered an answer consisting of a general denial, and a special answer stating the terms of the bill

of lading, and proceeding, "And defendant says that the said contract or bill of lading for the transportation of plaintiff's said goods and property contained no notice of the said articles of gold, silver, precious stones, metals, jewelry, treasures, works of art, nor the value thereof; wherefore defendant says," etc.

Counter affidavits opposing the motion to set aside the default were filed by plaintiff, but it is not important to state their substance at this period. We think the fact stated so far excused the failure to answer, that, if there was also a showing of a valid and meritorious defence, the court should have allowed the defendant an opportunity to make that defence available. The case made out is one of mistake and accident appealing strongly for relief from the judgment, if it be made to appear that the defendant would otherwise be deprived of a valid and meritorious defence. The purport of that defence as stated in the motion and affidavits is, 1st, the excessiveness of the claim; 2d, that by the terms of the bill of lading defendants were not liable—the jewelry, works of art, articles of gold and silver, etc., not being noticed therein, nor their value stated.

The court, whilst refusing to set aside the default, allowed the railroad company to interpose its defence as to the quantity of goods shipped and their value, and to introduce evidence on those points as if no default had been taken. In so far as relates to the defence that the claim was excessive, appellant cannot complain that he was deprived of an opportunity to make it fully available.

The only other defence set up at this stage of the case was, that, by the terms of the bill of lading, defendants were not liable. Was this a valid defence under the statutes of this state?

In 1860 it was enacted, "That common carriers of goods for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law, by any general or actual notice, nor by inserting exceptions in the bill of lading, or memorandum given upon the receipt of the goods for transportation, nor in any other manner, except by special agreement between the carrier and shipper, reduced to writing, and signed by the parties or their agents." In December, 1863, this act was amended so as to read: "Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading, or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever; and no special agreement made in contravention of the foregoing provisions of this article shall be valid." Pasch. Dig., art. 452 and

note 329. As thus amended, this article was carried into the Revised Statutes, and is still the law of this state. R. S., art. 278.

The defence that the company was exempt from liability because of the exceptions or stipulations in the bill of lading, seems to us plainly invalid under the statute. The claim is not only to limit and restrict the liability of the company by provisions inserted in the bill of lading, but to make these provisions relieve them from all liability. For reasons of public policy, and having regard, doubtless, to the "inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public," the legislation of this state, and the previous decisions of our courts, hold common carriers liable as at common law for all losses "not occasioned by the act of God or public enemies," and declare invalid any exceptions or special contract seeking to vary that liability. *Chevallier v. Strahan*, 2 Tex. 115; *Arnold v. Jones*, 26 Tex. 337. See also *Heaton and Bro. v. Morgan's La. and Tex. R. R. and S. S. Co.*, Court of Appeals, 4 Tex. L. J., p. 375; and *R. R. Co. v. Lockwood*. 17 Wallace.

Whilst, under our statute, it is no defence for a carrier sued for goods lost, however valuable, to reply that by the terms of the bill of lading he was not responsible for such goods, because beyond question he would at common law be liable for the loss of money or other valuables, whether a bill of lading were given specifying them or not, it is not believed that the statute in any wise restricts the operation of the common law rule, that where the shipper of valuables practises a fraud on the carrier, either by his acts or omissions, fraudulently concealing the value of the article shipped, the carrier is discharged. *Gibbon v. Poynton*, 4 Burr, 2298; *Batson v. Donovan*, 4 Barn. & Ald. 373; *Orange County Bank v. Brown*, 9 Wend. 85; *Magnin v. Dinsmore*, 62 N. Y. 35; *Oppenheimer & Co. v. U. S. Ex. Co.*, 69 Ill. 62; *Hollister v. Nowlen*, 19 Wend. 234; N. Y. Cent., etc., v. *Fraloff*, 100 U. S. 24, reported also in *Thompson on Carriers of Passengers*, p. 502; *Hawson on Carriers*, sec. 20, and cases cited.

If the defence had been made, and substantiated by affidavits, that Mrs. Burke, knowing the contents of the bill of lading in use by the company, and knowing that good faith to the company required her to give information in regard to jewelry, articles of gold and silver, etc., shipped by her, concealed the fact and value of the shipment of such articles, shipping them in a way that would naturally lead the carrier to believe them of small value, there are common law authorities that this would operate a fraud on the carrier and would discharge him from liability. *Batson v. Donovan*, supra; *Lawson on Carriers*, sec. 20, and authorities cited. But whatever effect the giving of notices, or the insertion of provisions in the bill of lading, "designed simply to secure good faith and fair dealing on the part of the employee,"

may have if brought home to the knowledge of the owner, to protect the carrier from fraud, we think it clear that in this state they can only be looked to for that purpose, and cannot be treated as changing the contract or changing the liability of the carrier.

The original motion to set aside the default did not state facts showing a valid, meritorious defence, and we therefore cannot say that the court erred in overruling it.

On December 8th, during the same term of court, the presiding judge, however, not being the same as when the first motion was passed on, the defendant filed another motion to set aside the default, proffering to go to trial at once. The substance of this application is thus stated in the brief of counsel for appellant:

"The application prays the court to vacate the order of October 16, 1880, and to now set aside the judgment by default on terms, permitting defendant full answer and defence to the merits of plaintiff's cause of action; and, if this be not granted, defendant prays that said order be so modified in its terms as to permit defendant to make the following additional defences:

"1. That by express agreement between plaintiff and the said Morgan's Louisiana and Texas Railroad and Steamship Company at the time of and before the shipment of the goods and property mentioned in plaintiff's petition, it was agreed that plaintiff should take the risk of loss of said goods and property exceeding the sum of \$200, which sum plaintiff agreed, in case of loss of said goods, to receive in satisfaction therefor, and this in consideration of said company's undertaking to carry said goods and property below the usual legal and ordinary rates.

"2. That plaintiff fraudulently and deceitfully concealed the true value and nature of said goods and property, and by her acts and by the manner of packing and billing said goods, and by her declarations to the agent of said Morgan's Louisiana and Texas Railroad and Steamship Company, at the time of and before the shipment of said property, induced said company and also this defendant to believe that said property was of small value, and consisted only of second-hand household goods and furniture; and plaintiff fraudulently concealed within the same the jewels, works of art, silverware, and all the property other than household goods and furniture mentioned in plaintiff's petition; and that the fact of said concealment was unknown to defendant; and defendant received said property believing that the same consisted alone of second-hand household goods; and that defendant ought not by reason of these facts to be permitted to recover for the property so concealed.

"3. Same defence as set forth in proposed original answer, pleading terms of bill of lading. Said application closed as follows: And defendant says, that at the time of its original application to set aside the judgment by default herein, the said

defences foregoing were not fully known to defendant or its counsel, or, if known, the evidence to support the same was not within the jurisdiction of this court, or in power of defendant to be produced on said hearing; and defendant asks that reference be had to its original application to set aside said default in aid hereof.

"Application made reference to depositions on file, which were read in support thereof, as follows:

"S. C. Childress testifies: I made a contract with plaintiff for shipment of household goods by steamship to Clinton, thence via railroad to Austin. Bill of lading was signed Sloo. The character of goods shipped, according to her representations to me at the time they were delivered for shipment, was as old second-hand household goods. Plaintiff sent the man who packed the goods to depot to have them shipped by him, and he took the bill of lading for them. Was then and am still in employ of Morgan's line. The goods were shipped as old, second-hand household goods; owner's risk, and so stated in bill of lading."

Beyond the deposition of Childress no attempt was made to show facts substantiating the defence offered, nor was either motion or answer verified by affidavit.

In resisting the former motion, the affidavits of the plaintiff, and of her mother, Mrs. De Bolle, had been filed—the substance of which is thus stated in the brief of appellee:

"The former was, in substance, that she went four times to the office of Morgan's Louisiana and Texas Railroad and Steamship Company for the purpose of inquiring as to the best and safest way of shipping her household effects from New Orleans to Austin, Texas; that she was referred to the agent of said company and talked with him on three different occasions, relative to said shipment; that she distinctly said to him that she had very valuable paintings, with costly and elegant furniture; that she feared they might be injured in the loading and unloading of the cars and steamer, and asked him how far the company would be liable. He replied that if any articles were really injured or destroyed, the company is liable and will pay for them; that she also asked him how much baggage can each passenger take with them. 'Only one hundred and fifty pounds,' was the reply of said agent. Then she said to the said agent, in substance: 'Can I, or would it be better for me, to send my trunks at the same time with my household effects?' He replied: 'You can, and it would be better.' That she was not asked by said company, or any of its agents, as to the nature or quality of any of the articles she proposed to ship to Austin; that she was not told by said company, and did not know, that said company proposed to claim for itself and connecting lines exemption from liability on account of the nature of some of the goods shipped; that the only requirement demanded by said company was, that each separate package of

goods should be numbered, so that in the event of its loss it could be found; with that requirement she complied. A portion of the lost goods sued for were shipped on June 3, 1880; on June 4, in the morning, the packer carried down other packages of the goods lost, and reported to her that the goods shipped the previous day had left New Orleans. About seven o'clock P.M., June 4, the packer brought her the bill of lading of all of the goods, and said: 'We just got down in time to ship the remaining goods; that the car started right away with the goods, and I hurried up to the office of C. A. Whitney and Co. and got this bill of lading.' That she never assented to the exceptions and limitations referred to in the bill of lading. Trans., 79-81.

"Mrs. De Bolle in substance swore that she had lived with her daughter, the plaintiff, for three years next before her removal to Texas; that she was well acquainted with the goods sued for; that she accompanied plaintiff on two occasions when she went to the office of C. A. Whitney and Co. to inquire as to the shipment of the goods sued for, and heard the conversation with the agent of said company, relative to the shipment of said goods, detailed by plaintiff in her affidavit in this case. That she heard plaintiff tell said agent that she had valuable paintings to ship. She also informed him that the furniture was fine and costly. That she heard the advice of said agent as to the shipment of the trunks, in which conversation and connection she, Mrs. De Bolle, told him 'that there would be valuables in said trunks,' meaning, and intending to convey to his mind, that there would be jewels and other articles of great value in said trunks; that there was no intimation by said agent or any one else, in either of these conversations, of any restrictions or limitations of liability by reason of the value or character of said shipment."

Bearing in mind that these sworn statements negating any concealment or fraud had been on file for near two months, it would seem reasonable to expect that the defendant in asking the court to be allowed to make the defence of fraudulent concealment, would have filed affidavits showing its version of what passed between plaintiff and its agent, showing what there was in the manner of packing, etc., calculated to deceive, and showing at least that plaintiff had knowledge of the contents of the bill of lading. The very meagre statements of Childress, being wholly silent as to plaintiff's knowledge, leaving throughout the charge of fraud unsubstantiated otherwise than by indulging largely in inference and surmise, did not amount to such an establishment of the charge as required the court to admit the defence. Especially do we think that the showing was insufficient when it is recollected that the court had already before it counter-affidavits giving in detail a statement showing the absence of fraud. Assuredly if the defence of fraud had been substantiated by affidavits on the one hand, and denied by conflicting

affidavits on the other, the court should, in case of doubt, have allowed the defendant to have a jury pass upon the issue. But regarding the application as itself insufficient, we conclude that the court did not err in overruling it.

The questions of evidence and practice which are presented are quite numerous.

We propose to consider, first, defendant's 14th assignment of error, presenting the proposition that evidence of G. B. Burke as to the cost of pictures should have been withdrawn from the jury when it transpired that the same was hearsay.

In plaintiff's bill of particulars of articles lost are the following articles, viz.:

Child and Dog, by Inman.....	\$1,500
Three portraits, by Sully, at \$1000 each.....	3,000
Group of children, by Beard and Moise.....	1,000
Portrait, by Fowler.....	500

It appears that these were family portraits and paintings by distinguished artists, and there was considerable evidence bearing on the question of their value. Mr. G. B. Burke, a son of plaintiff's deceased husband, Glendy Burke, testified that each of those paintings named above, except the last, cost \$1000, and that the last, a portrait of Glendy Burke, by Fowler, cost \$500. On cross-examination it was developed that he had no personal knowledge of the cost, but had learned of it from his father and traditions in the family. We think that this was hearsay testimony, and that the court should have sustained the motion to exclude it. Appellee replies that there was sufficient competent evidence before the jury to warrant the verdict, and that the admission of improper evidence, cumulative in its nature, will not authorize a reversal of the judgment. The testimony of Mrs. Burke, and of artists of eminence in New York, tends to show that, as works of art, the market value of these paintings, in New York, or at a point where such works of art can be said to have a market value, was fully as great as the cost price affixed by G. B. Burke. On the other hand, the testimony of Moise, an artist, tends to fix their cost at prices considerably less. In its charge the court gave the jury, as the standard of value of the articles lost, their market value at Austin; and if any of the articles had no market value at Austin, and yet had a market value at other places, that value at the nearest place to Austin where it existed was made the standard. The court also charged, "In determining the value of family portraits, which have no market value, if you find such to have been lost, you may look to the original cost of the same, and to the probable cost of reproducing or replacing the same, as shown by the testimony." In view of the prominence given in this charge to the question of original cost, we are unable to see that evidence as to such cost is

merely cumulative of other evidence as to value. The verdict of the jury is general, and does not show what value they affix to the pictures; nor can we know how far they were influenced in valuing them by the evidence of Mr. Burke as to their cost. "A party has a right to have none but legal evidence submitted to a jury. And where that which is irrelevant" (or hearsay) "has been admitted against the objections of the party, if it may have had an improper influence upon the jury it will require a reversal of the judgment." *Waul v. Hardie*, 17 Tex. 558. In our opinion this error is fatal to the judgment.

We are also of opinion that the motion to suppress the depositions of Huntingdon and others should have been entertained and the depositions suppressed. The depositions were filed December 9, but were not indorsed, as required by the statute, by the postmaster mailing the same, so as to show that he received them from the hands of the officer before whom they were taken. R. S., art. 2231. A motion to suppress the depositions for this reason was made and overruled under the following circumstances:

The depositions had been on file an entire day. The case was called for trial on regular call of docket. Defendant's counsel, Mr. Goldthwaite, said he presumed the defendant would be ready, when Walton, Green & Hill, his associates, came into court. While the court was waiting for associate counsel, Mr. Goldthwaite prepared the objections in writing, filed the same with the clerk of the court, and said in open court: "If your Honor please, I desire to call the attention of the opposing counsel to these objections which I have filed to the depositions of the witnesses on file," and offered the paper just filed to the opposing counsel, who did not take it, but who then said: "Read them to the court;" whereupon they were read to the court and argued.

The motion was resisted by counsel for plaintiff, because:

1. It came too late.
2. The plaintiff had no legal notice of the motion.

The court sustained plaintiff's objections and refused to suppress the deposition on the grounds of objection made by the defendant. Defendant excepted.

The statute, when the depositions have been on file an entire day, says: "No objections to the form thereof, or the manner of taking the same, shall be heard, unless such objections are in writing, and notice thereof is given to the opposite counsel before the trial of suit commences." R. S., art. 2235. If the ruling of the court was based on the ground that the trial had commenced, we think it erroneous. The object of the statute is to secure a party from being taken by surprise by such formal objections to his evidence after entering on the trial. If such objections could be made after both parties had announced ready, the object of the statute would be defeated. But until such announcement, we do not think

that the trial of the suit had commenced, within the meaning of the statute. In this case the notice was not given in writing, and, beyond question, notices which become necessary in the progress of a suit should ordinarily be in writing. Sayles' Practice, secs. 630, 631; R. S., art. 1453. But we have seen that actual notice was given to counsel in open court, and we are of opinion that, under the circumstances, the whole thing having transpired at the time, and in the presence of the court, and as a part of the proceedings in the case after called for trial, that the notice might well have been held sufficient. As the judgment is reversed on other grounds, it is not necessary to determine whether this would be of itself an error requiring a reversal.

In regard to the remaining questions, we propose, without attempting their discussion, to state concisely our conclusions on such of them only as may again arise on another trial. The court did not err, or exceed its discretionary power, in refusing to exclude certain interrogatories as leading, but did err in allowing witnesses to give their opinions as to the measure of damages for lost furniture, that being a matter of law.

Nor did the court err in allowing the witness Mrs. Burke to refresh her memory as to the numerous articles lost and their values, by referring to a bill of particulars known by her to be a copy of a correct memorandum of articles and values made by herself. 1 Greenleaf on Ev., secs. 436, 438.

We do not think that the interrogatories and answers of Beard, Huntingdon and others should have been excluded as irrelevant. They tended to show the market value of the portraits and paintings; to explain, as far as might be, the circumstances affecting the market value of such paintings.

We think the pleadings of plaintiff were sufficient to authorize evidence of the character and value of the picture frames, and the contents and value of the library and trunk.

We see no error in other rulings of the court in admitting or excluding evidence.

We have seen that the charge of the court made the market value of the articles lost the measure of damages, but added a clause as follows: "In determining the value of the family portraits, which have no market value, if you find such to have been lost, you may look to the original cost of the same, and to the probable cost of reproducing and replacing the same as shown by the testimony." The measure of damages allowed in this clause of the charge is objected to, but the brief does not inform us of the grounds of objection or the precise legal question intended to be made. That part of the charge is in accordance with the rule recently laid down by the supreme court of Massachusetts. *Green v. Boston* (1879), Cent. L. J., vol. x. p. 208.

In regard to a family portrait which might be reproduced, the

artist and the subject both being still accessible, it is not perceived why the owner would not be entitled to supply the lost portrait, and to recover of the carrier the cost. This is said to be the owner's right in case of lost articles generally. *O'Hanlan v. G. W. Ry. Co.*, 6 Best & Smith, 493 (118 Eng. Com. Law, 491); *Wood's Mayne on Damages*, p. 401. But when it is impracticable to replace the painting, and where the original cost was incurred at a time long past, and under circumstances differing widely from those affecting the present value, the charge given would be of doubtful applicability, and, at all events, should be better qualified or explained so as to guard the jury against making the first cost and the cost of replacing the exclusive measure of value. We do not understand the plaintiff as claiming, or the charge of the court as allowing, damages because of the peculiar value attached by the owner to the portraits, the "*pretium affectionis*," as it is styled. The claim of the plaintiff seems to be, that as works of art, paintings by artists of established reputation, of subjects calculated to give those paintings value in the eyes of those who buy such works of art, the lost portraits had a value, aside from any peculiar value for family reasons. As bearing on this claim we cannot say that the charge given was erroneous, although we think it would have been better adapted to the case had it been qualified or explained.

For the reasons heretofore given the judgment is reversed and the cause remanded.

Reversed and remanded.

We intend to present to our readers in this note a brief statement of the law relative to concealments and misrepresentation by shippers of the true nature and value of goods delivered by them to carriers. The cases are not very numerous upon the point. Hence it has been judged wisest to include cases relating to other carriers than railway companies.

The following admirable statement of the law is from the opinion of the court in *Relf v. Rapp*, 8 W. & S. 21: "A common carrier is answerable for the loss of a box or parcel of goods, though he is ignorant of the contents or though those contents be ever so valuable, unless he made a special acceptance. Even this principle has been doubted, but the better opinion is, the carrier would be responsible, and this is reasonable, because he can always guard himself by a special acceptance or by insisting to be made acquainted with the general nature of the articles and of their value before he consents to receive them. If he omits this, he shall not escape responsibility because of his own negligence. But the rule is subject to a reasonable qualification, and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the articles, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of his goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation he is entitled to, in proportion to the value of the articles entrusted to his care and the consequent risk he incurs; and it tends to lessen the vigilance the carrier would otherwise bestow. The qualification of the rule is as important to be observed as the rule. It is absolutely necessary for the protection of carriers, who would otherwise be exposed to great frauds. With what show of justice can a man ask to be paid for an article of great

value when he has induced the carrier by false assertions to believe that it is of much inferior value? It is just, when he asks compensation from the innocent owner, to hold him strictly to his own declarations. He has no right in order to cheapen the freight, which is the usual inducement, to expose the owner to an increased risk, as must inevitably be the case where the nature and value of the goods are studiously concealed."

The language used in this case was approved in *Coxe v. Hasley*, 19 Pa. St. 243; in *Orange Co. Bank v. Brown*, 9 Wend. 116, the same doctrine is thus stated:

"If any means are used to conceal the nature of the article and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness and its consequence to the carrier, upon the principles of common justice, will exempt him from liability; for such a result is alike due to the carrier, who has received no reward for the risk, and to the party who has been the cause of it by means of disingenuous and unfair dealing."

Where accordingly bank-bills were packed in a chest with clothes and the fact of their existence was not disclosed to the carrier, it was held that he was not liable for the loss of the bills. *Chicago & Aurora R. Co. v. Thompson*, 19 Ill. 578. And so where articles of a brittle nature are sent without any intimation of the peculiarly delicate care necessary for their transportation, the carrier will not be liable in case of breakage. *American Express Co. v. Perkins*, 43 Ill. 458. Where a person sent 200 sovereigns packed in six pounds of tea and a loss occurred Lord Tenterden left it to the jury to say whether the means adopted by the shipper were such as were calculated to deceive the carrier, and whether the loss had occurred in consequence of such deceit. The jury found both these points in the affirmative, and a verdict was accordingly rendered for defendant. *Bradley v. Waterhouse*, 1 Moo. & M. 154.

A shipper may exempt a carrier from liability by many other similar acts amounting to fraud, as by sending, a large sum of money concealed in a bag of hay (*Gibbon v. Paynton*, 4 Burr, 2298), or placed in a box with articles of small value (*Belger v. Dinsmore*, 51 N. Y. 266; *Earnest v. Express Co.*, 1 Woods, 573; *Maguin v. Dinsmore*, 62 N. Y. 85; *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578), or by sending a diamond ring in a small paper bag tied up with string (*Everett v. Southern Express Co.*, 46 Ga. 303), or by sending valuable jewelry under any circumstances which would naturally lead the carrier to conclude that it was of trifling value (*Oppenheimer v. United States Express Co.*, 69 Ill. 62), or by sending a check indorsed in blank in a letter (*Hayes v. Wells*, 23 Cal. 185), or by sending money in a package not indorsed and sealed in the particular manner required by the carrier (*St. John v. Express Co.*, 1 Woods, 612).

The numerous cases relative to the liability of a carrier for articles of extraordinary value included in a passenger's baggage rest upon similar principles. The carrier is not liable for articles of special or extraordinary value unless their existence is revealed to him. *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffmann*, 6 Hub. 586; *Weed v. Saratoga R. R. Co.*, 19 Wend. 584; *Bell v. Drew*, 4 E. D. Smith, 59; *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326; *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116; *Hirschsohn v. Hamburg American P. Co.*, 2 Jones & Spencer, 521; *Collins v. Boston, etc., R. Co.*, 10 Cush. 506; *Smith v. Boston, etc., R. Co.*, 44 N. H. 325; *Alling v. Boston, etc., R. Co.*, 126 Mass. 121; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Hickox v. Naugatuck R. Co.*, 31 Conn. 321; *The Ionic*, 5 Blatch. 538; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Mississippi, etc., R. Co. v. Kennedy*, 41 Miss. 671; *Dibble v. Brown*, 12 Ga. 217; *Hutchings v. Western, etc., R. Co.*, 25 Ga. 81; *Bomar v. Maxwell*, 9 Humph. 631; *Johnson v. Stone*, 11 Humph. 419; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262; *Hopkins v. Westcott*,

6 Blatch, 64; Chicago, etc., R. Co. v. Collins, 56 Ill. 212; Davis v. Michigan R. Co., 23 Ill. 278; Baltimore, etc., R. Co. v. Smith, 23 Md. 402; Olumit v. Henshaw, 35 Vt. 604; First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 260; Chicago, etc., R. Co. v. Boyce, 73 Ill. 510; Michigan, etc., R. Co. v. Canon, 73 Ill. 348; Lee v. Grand Trunk R. Co., 36 Upp. Can. Q. B. 350; Railroad Co. v. Fraioff, 100 U. S. 24.

Where a carrier by his contract limits his liability to a specified amount, and the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law which discharges the carrier from liability for ordinary negligence. *Magnin v. Dinsmore*, 62 N. Y. 35.

A fortiori of course are all the above observations true where the shipper is not only silent but actually guilty of fraudulent misrepresentations by act or deed. Where a trunk containing jewelry was shipped marked "glass," and represented to be so, in consequence of which a low rate of freight was paid, the carrier was not held liable for the loss. *Relf v. Rapp*, 3 W. & S. 21. And where a person shipping horses wilfully understated their value in order to procure a cheaper rate of freight, it was held that on the loss of them he could not prove their real value and recover that amount from the carrier, but that the whole contract was vitiated by the fraud. *McCance v. London & N. W. R. Co.*, 7 Hurl. & Norm. 477.

The shipper can in no case recover from the carrier more than he has represented the goods to be worth. *Edwards v. Sherratt*, 1 East. 604; *Batson v. Donovan*, 4 Barn. & Ald. 2; *Titchburne v. White*, 1 Strange. 145; *Harris v. Packwood*, 3 Taunt. 264; *Gibbon v. Paynton*, 4 Burr. 2298; *Kenny v. Eggleston Aleyn*, 93; *Tyby v. Morrice Carth.* 485. And according to the current of modern authority he cannot in case of a fraudulent representation recover this, for the fraud vitiates the whole contract. In all the cases above mentioned the shipper is held guilty of constructive fraud, even though no actual fraud be intended by him. *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Cooper v. Berry*, 21 Ga. 526; *Great Northern R. Co. v. Shepherd*, 14 Eng. L. & Eq. 867.

There is, however, a qualification of the principles above laid down which must be carefully noted. If there are no improper means or artifice adopted by the person who sent the goods to conceal the nature and value of the box, parcel or package, to mislead or deceive the carrier, the person sending the goods is not usually bound to make the disclosure unless inquiry be made of him by the carrier on the subject. *Sewall v. Allen*, 6 Wendell, 849; *Hollister v. Newlin*, 19 Wend. 284; *Phillips v. Earl*, 8 Pick. 182; *Brooke v. Pickwick*, 4 Bing. 218; *Batson v. Donovan*, 4 B. & Ald. 21; *Sleat v. Fagg*, 5 B. & Ald. 342; *Southern Express Co. v. Crook*, 44 Ala. 468; *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90; *Camden & Amboy R. Co. v. Baldauf*, 16 Pa. St. 67; *Relf v. Rapp*, 3 W. & S. 21. Although of course if he be asked the question he must give a true answer. *Boscowitz v. Adams Express*, 5 Cent. L. J. 58. *Baron Parke*, in *Walker v. Jackson*, 10 M. & W. 168, lays down this doctrine as follows:

"I take it to be now perfectly well understood, according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he asks no questions and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask the questions; if they are answered improperly so as to deceive him then there is no contract between the parties; it is a ground which vitiates the contract altogether."

In the above cited case the facts were briefly these:—The plaintiff went on

board the defendant's steamboat with his horse and carriage, paying the defendant's usual ferry charge for his vehicle. Underneath the seat he had stored watches and jewelry of great value which much increased the weight, and of which he said nothing to defendant. In running the wagon off the boat upon the slip two of defendant's servants were overpowered by its weight, let it fall, and in consequence it ran into the river. The carrier was nevertheless under the circumstances held liable for the loss.

According to some authorities if the carrier posts up a notice requiring shippers to inform him of the character and value of the merchandise shipped, he is not obliged to inquire from the shipper as to such merchandise, and it amounts to a fraud on the part of the shipper, if the articles be other than they outwardly appear, to remain silent. *Orange Co. Bank v. Brown*, 9 Wend. 145; *Batson v. Donovan*, 4 Bam. & Ald. 21; see contra, *Slent v. Fagg*, 5 B. & Ald. 342; *Brooke v. Pickwick*, 4 Bing. 218; *Butt v. Gt. Western R. Co.*, 11 C. B. 140; *Garnett v. Willan*, 5 B. & Ald. 58; *Riley v. Horne*, 5 Bing. 217; *Bignold v. Waterhouse*, 1 Maule & S. 255.

Where a shipper informs a carrier that a certain package dispatched by him is very valuable, but fails to tell him that it contains money, there is no ground to impute fraud on his part. *Allen v. Sewall*, 2 Wend. 327.

Where a shipper, knowing that the freight for linen was less than for silk, dispatched certain bales of the latter material, receiving for them a bill of lading in which they were termed "linen" but bearing on its face a stamp "weight, value and contents unknown," it was held that there was not under the circumstances any ground to exempt the carrier from liability in case of loss for the full value of the silk. *Lebeau v. General Steam Nav. Co.*, L. R. 8 C. P. 88.

FORBES

v.

BOSTON AND LOWELL R. R. CO.

(*Advance Case. Massachusetts, 1882.*)

The transfer of a bill of lading whether absolute or by way of pledge conveys to the transferee either a general or special property in the goods for which the bill is given of such a character that he is entitled to entertain an action of trover in case of the conversion of such goods.

A misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion which renders the bailee liable in an action of trover, without regard to the question of his due care or negligence.

A in Chicago shipped certain goods to B in Boston, receiving a bill of lading by which the railroad company undertook to deliver the goods to B or order. B having received the bill of lading, indorsed it to C as a security for an advance and it was held by C when the goods arrived. As between B and C it was agreed that B should pay the freight. The goods arrived in Boston on Oct. 30, and remained in the cars until Dec. 12. On that day B demanded them without producing the bill of lading, and the company finding by their way bill that he was the consignee delivered said goods to him. The goods were afterwards sent abroad and C subsequently brought trover

against the railroad company for them. *Held*, that there had been no laches on the plaintiff's part and that under the principles above laid down he was entitled to recover.

The plaintiff's measure of damages in the above case was the market value of the goods at the time of the conversion less the freight, together with interest thereon.

In a case which was in all other respects similar to the above, the bill of lading was drawn to B only and not to B's order. A custom was also proved on the part of all railroad companies terminating in Boston to deliver to the consignee all goods thus billed, relying upon the way bill without requiring the production of the bill of lading. *Held*, that under these circumstances C as transferee of the bill of lading was not entitled to recover in an action of trover against the railroad company.

MORRIS, C. J.—This is an action of tort containing a count for the conversion of a quantity of corn and a count for the conversion of a quantity of wheat. As different considerations apply to the two counts, they must be treated separately.

On or about October 20, 1879, Gallup, Clark & Co., grain dealers in Chicago, in response to an order from Foster & Co., forwarded to Boston fifty carloads of corn by the National Despatch Fast Freight Line, which is an association of several railroad companies whose roads make a continuous line from Chicago to Boston, the defendant's road being a part of the line. Upon the shipping of the corn a bill of lading was issued, by which it was consigned to the order of Gallup, Clark & Co., at Boston. Gallup, Clark & Co. drew a draft upon Foster & Co., for the price of the corn, attached to it the bill of lading and forwarded both to the Tremont National Bank, of Boston. On October 24, 1879, Foster & Co. paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading Foster & Co. indorsed them to the plaintiffs as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on October 30, 1879. It remained in its cars until December 12, 1879, when by the orders of Foster & Co. it was shipped on board a vessel for Cork, and exported to Ireland. Foster & Co. did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts it is too clear to admit of any doubt that by the transfer of the draft and bill of lading by Foster & Co. to the plaintiffs, the title and property in the corn passed to the plaintiffs. The bill of lading, though not strictly a negotiable instrument like a bill of exchange, was the representative of the property itself, it was the means by which the property is put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.

The transaction between Foster & Co. and the plaintiffs was not in form or in effect a mortgage so that, as claimed by the defendant, it must be recorded in order to have validity; it was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds or a title as pledge is not material, as all the authorities show that they took either a general or a special property in the corn which entitles them to recover of any one who wrongfully converts it. *DeWolf v. Gardner*, 12 Cush. 19; *Cairo National Bank v. Crocker*, 111 Mass. 163; *Greenbay National Bank v. Dearborn*, 115 Mass. 219; *Chicago National Bank v. Bailey*, 115 Mass. 228; *Hathaway v. Haynes*, 124 Mass. 311; *Gibson v. Stevens*, 8 How. 384; *Dows v. National Exchange Bank*, 91 U. S. 618. Numerous other authorities might be cited. The delivery of the bill of lading was in law the delivery of the property itself, and it was not necessary that the plaintiffs should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. *Farmers & Mechanics' National Bank v. Logan*, 74 N. Y. 568, *The Thames*, 14 Wall. 98; *Meyerstein v. Barber*, L. R., 2 C. P. 38, 661; L. R., 4 H. L. 317. It is true that the plaintiffs might by their subsequent laches defeat their right to assert their title. If they permitted the property to remain under the control of their assignors, and held them out to the world as having the right to deal with the property, they might be estopped from setting up their title. But the authorities are decisive to the point that by the transfer from Foster & Co. they took a title as purchasers of the corn which entitles them to maintain this action, unless they have lost the right by their laches, upon proving a conversion by the defendant.

The next question is whether there was a conversion by the defendant. It is settled that any misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion which renders the bailee liable in an action of tort in the nature of trover without regard to the question of his due care or negligence. *Hall v. Boston & Worcester R. R.*, 12 Allen, 439. By the bill of lading and by the way bill, which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark & Co. The defendant contracted to deliver it to such persons as Gallup, Clark & Co. should order, and could not without violating their contract deliver it to any other person. By delivering it to Foster & Co. therefore the defendant became liable for a conversion, unless it shows some valid excuse. *Newcomb v. Boston & Lowell R. R.*, 115 Mass. 230; *Alderman v. Eastern R. R.*, 115

Mass. 238. The record before us does not show any laches or any act of the plaintiffs which can excuse or justify this misdelivery. They did not hold Foster & Co. out to the world or to the defendant as one entitled to control the property. Indeed it is admitted that the defendant did not know until long after the delivery that the plaintiffs had any connection with the property, or with Foster & Co. The plaintiffs did nothing to mislead the defendant. They had the right to rely upon the facts that they held the bill of lading and that according to the ordinary course of business the goods could not be obtained except upon its production. The defendant saw fit to deliver them to Foster & Co. without requiring them to produce the bill of lading, relying upon their representation that they were the holder of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs, who have done nothing to mislead or deceive the defendant. We are for these reasons of opinion that the defendant is liable for the value of the corn described in the first count of the declaration.

In the case of the wheat there are some facts proved at the trial which lead us to a different result. By the bills of lading and the way bills the wheat was consigned to John H. Foster & Co., at Boston. The fact that they did not contain the words "or order" or other equivalent words so as to make them upon the face quasi negotiable, is not important. The bill of lading was yet the representative of the wheat, and its transfer and delivery to the plaintiffs vested in them the title to the property as against the consignees and their creditors. But the presiding justice of the Supreme Court who heard the case has found as a fact "that it was the custom of the railroads terminating in Boston to deliver to the consignee, goods 'billed straight' as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the way bills to determine the consignee and the form of the consignment."

Under this finding we must assume that the custom existed and that the plaintiffs knew or ought to have known of it. It materially affects the relations and rights of the parties. Although it does not affect the question of the title of the plaintiffs as against Foster & Co., it qualifies the duties of the defendant as to the delivery of the wheat. It justified the defendant in delivering it to Foster & Co., the consignees, at least at any time before notice that the property had been transferred. Under it there was no laches in not calling for the bill of lading, and in thus delivering there was no violation of any of the terms of its contract express or implied. Such delivery therefore was not a misdelivery which would amount to a conversion, and render the defendant liable to the plaintiffs. We are therefore of opinion that the defendant is not liable for the value of the wheat sued for.

The only remaining question is as to the amount of the damages the plaintiffs are entitled to recover for the conversion of the corn. As a general rule, the measure of the damages in trover is the market value of the goods converted, with interest from the date of the conversion. This rule is, however, subject to modification when the plaintiff has only a special interest or property in the goods and is not answerable over to any person for the balance of the value. *Fowler v. Gilman*, 13 Met. 267; *Briggs v. Boston and Lowell R. R.*, 6 Allen, 246; *Pebbles v. Boston and Albany R. R.*, 112 Mass. 498. The object of the law is to give the plaintiff compensation or indemnity for the injury he sustains by the conversion. In the case before us, at the time of the conversion, the goods were subject to a lien for the freight. The only interest which the plaintiffs had in them was their market value less the freight. This interest was not increased by the fact that the plaintiffs and Foster & Co. had agreed as between themselves that the latter should pay the freight. The payment by Foster & Co. cannot be considered as a payment by the plaintiffs. It was a payment by themselves as a part of their scheme of fraud. If the plaintiffs can recover the full value of the corn they are positive gainers by the fraud and will receive more than the value of their interest at the time the fraud was committed. Under the circumstances of this case, we are of opinion that it is just and equitable that the reclamation by the defendant from Foster & Co. of a part of the proceeds of the fraud should inure to the benefit of the defendant.

Upon the whole case, therefore, the plaintiffs are entitled to recover a sum equal to the market value of the corn described in the first count less the freight, with interest thereon from the time of the conversion. If the parties cannot agree upon the amount the case must be sent to an assessor to determine the damages upon this basis.

Judgment accordingly.

FORBES ET AL.

v.

FITCHBURG R. R. Co.

(*Advance Case, Massachusetts. 1882.*)

In shipping goods from Chicago to Boston the usual course of trade is to forward the goods by vessel on the Great Lakes as far as Buffalo, and from thence to transport them by rail to Boston. A bill of lading is given to the consignor at Chicago by the owners of the vessel, drawn to the consignor's order at Buffalo. At Buffalo when the goods are put in the cars, the railroad company gives a memorandum receipt reciting that the vessel's bill of lading is still outstanding, is to be regarded as transferring the property, and is alone to be used in procuring the goods from the railway company. Goods

being forwarded in accordance with the above-mentioned course of trade, the vessel's bill of lading was transferred by the consignee, to whom it had been endorsed prior to the arrival of the goods in Boston. The goods were, however, delivered to the consignee by the railway company without demanding the bill of lading. In an action by the transferee of the bill against the company for the misdelivery, *Held*, that said bill was not functus officio at Buffalo, but was effectual to transfer the property in the goods to plaintiff, and that therefore he was entitled to recover.

A railroad company transporting grain deposited the same in accordance with the custom of trade in a grain elevator at the point of destination, where it was mixed with other grain of like quality. Subsequently on demand it delivered to the consignee of such grain an equal quantity to that transported, but without demanding the bill of lading, which was drawn to the consignee's order. An indorsee of said bill prior to the arrival of the grain brought trover against the railway company for a misdelivery. *Held*, that the plaintiff was entitled to recover.

Where a case is submitted upon an agreed statement of facts the parties waive any objection to the form of the pleadings not expressly reserved.

MORTON, C. J.—This case is governed by the case of *Forbes v. Boston & Lowell Railroad*, ante. The controlling facts are nearly identical with those existing and applicable to the first count in that case. It is necessary, therefore, to discuss only those features of the present case which are claimed by the defendant to distinguish it from the former case.

By the bills of lading in this case the grain was shipped by a vessel at Chicago, deliverable to the order of Gallup, Clark & Co., at Buffalo. The defendant contends that upon the arrival of the vessel at Buffalo the bill of lading became functus officio. If this were so it would not affect the result, because the bill of lading was transferred before the vessel arrived at Buffalo. But it is clear that upon the facts agreed the bill of lading remained as the representative of the property at least until the transit was completed by the arrival at Boston. By the usual course of business in forwarding grain from Chicago to Boston, when the shipment is partly by water and partly by rail, a bill of lading is issued by the vessel at Chicago; the grain is transferred from the vessel to the cars at some intermediate point, usually at Buffalo, and the railroad company issues a receipt similar in form to those issued in this case. This receipt contains a memorandum like the one in this case, "ex. sch. Gallatin," which indicates "that the grain was received from a vessel arriving at Buffalo from Chicago, and that a bill of lading has been issued by that vessel and is outstanding. The vessel's bill of lading is regarded as transferring the property and that alone is used in procuring the goods from the carrier." It is clear that in such cases the parties contemplate a continuous transit from Chicago to Boston, and that the bill of lading is regarded as the representative of the grain during the whole of this transit. So far as any question in this case is concerned, the bills of lading have the same effect as if they had been bills from Chicago to Boston.

Upon the arrival of the grain in question at Boston, a part of it, according to the usual course of business, was stored by the defendant in its elevator, where it was mixed with other grain of a like quality. In such a case the owner of the grain thus stored is entitled to draw out an equivalent quantity of grain of the same quality, but not to receive the identical grain which he put in. The defendant contends that for this reason an action of tort in the nature of trover cannot be maintained. It is doubtful whether this ground is open to the defendant, the rule being that by submitting a case upon an agreed statement of facts, the parties waive any objection to the form of the pleadings not expressly reserved. But if this is otherwise, the objection cannot be sustained. When the grain was put in the elevator, the plaintiff and the other owners of grain stored therein become tenants in common in proportion to their respective interests. *Cushing v. Breed*, 14 Allen, 376; *Keeler v. Goodwin*, 111 Mass. 490; *Dows v. National Exchange Bank*, 91 U. S. 618. And a tenant in common of personal property may maintain trover against a stranger who converts the property or his interest in it. *Bryant v. Clifford*, 13 Met. 138; *Goell v. Morse*, 126 Mass. 480. At the time of the delivery to Foster & Co. the plaintiffs were the owners of the grain, entitled to the immediate possession. Such delivery was a separation of their grain from the bulk of the grain, and a misappropriation of it, and was a conversion for which the appropriate remedy is an action of tort in the nature of trover.

We are unable to see that this case can be distinguished in principle from the case of *Forbes v. Boston & Lowell Railroad*, and the result is that the plaintiffs are entitled to recover the market value of the grain, less the freight, storage and other expenses, with interest from the date of the conversion. If the parties cannot agree upon the amount, the case must be sent to an assessor to determine the amount of the damages upon this basis.

Judgment accordingly.

The above cases involve a most important question of law in regard to carriers, the law of misdelivery. It is proposed in the following note to collect the leading American cases on this point.

A misdelivery of goods by a carrier equally with an entire failure to deliver them is held a conversion on his part for which he is responsible. *Bowlin v. Nyc*, 10 Cush. 416; *Devereux v. Barclay*, 2 B. and A. 702; *Hawkins v. Hoffman*, 6 Hill, 586; *Rosenfeld v. Express*, 1 Woods, 181; *Winslow Ward & Co. v. Vermont and Mass. R. Co.*, 42 Vt. 700; *Nowhall v. Central Pac. R. Co.*, 51 Cal. 345.

Where, therefore, a railroad company stored certain barrels of flour at the point of destination, and upon presentation of an order from the consignee gave in exchange flour checks, it was held that it was guilty of a conversion in having subsequently delivered a portion of the flour to other persons than those holding the checks. *Hall v. Boston and Worcester R. R.*, 14 Allen, 439.

The carrier is bound to a very strict measure of responsibility to seek out

the proper person indicated as the consignee, and cannot excuse himself by setting up the fact that he has been imposed upon. Where, for example, certain goods were shipped without any bill of lading marked to the consignee or order the carrier is not justified in delivering the goods to a third party on the presentation by them of a letter from the consignor alluding to the shipment of goods to him similar to those in question upon the same day. *Viner v. New York, Alex., Georgetown and W. S. Co.*, 50 N. Y. 23.

The same principle applies where the carrier is deceived by fraud and false personation as to the identity of the consignee. *Winslow Ward & Co. v. Vt. and Mass. R. Co.*, 42 Vt. 700.

And that no matter how plausible the fraud and false personation may be. *Houston and Tex. Cent. R. Co. v. Adams*, 49 Tex. 748.

The carrier is likewise liable if it delivers the goods on a forged order purporting to be given by the consignee. *American Merchants' Union Express Co. v. Miller*, 78 Ill. 224. Even though the person presenting the order has formerly been the clerk of the consignee.

This doctrine was carried to an extraordinary length in *Price v. Oswego and Syracuse R. Co.*, 50 N. Y. 213 (reversing 58 Barb. 599). Here a person wrote ordering goods in the name of a fictitious firm. The goods were accordingly forwarded on the line of the defendant company directed to the fictitious firm. They were claimed by the person who had ordered them and were delivered to him by the company, he signing the pretended firm name. This person afterwards proving entirely irresponsible, the consignor sued the company for a misdelivery. The court held that they were entitled to recover.

Where there are two persons of the same name in one place the carrier is not liable for a misdelivery in giving the goods to one of the two when the other was intended by the consignor, and this even though the person to whom the goods are delivered is a comparative stranger in the town. The blame falls upon the shoulders of the consignor for not more specifically marking the goods. *Bush v. St. Louis R. Co. and N. R. Co.*, 8 Mo. App. 62.

Where the goods are delivered by the carrier to a person professing to be the consignee, and who is identified as such by a trustworthy party, and who calls for the goods at about the proper season, this state of facts raises a reasonable prima-facie presumption that a proper delivery has been made, and the burden of proof is on the party alleging a misdelivery. *Ten Eyck v. Harris*, 47 Ill. 268.

Where goods are directed to the consignee the carrier cannot discharge himself from liability by delivering them to the consignor's general agent at the point of destination: *Ela v. American Mch'ts Union Express Co.*, 29 Wisc. 611; and this even though no such person as the consignee lives at the point of destination. *Wilson Sewing Machine Co. v. Louisville and Nashville R. Co.*, 71 Mo. 208.

Where certain dutiable goods were sent in bond from a point in Canada to a point in Massachusetts, directed to a special agent who was to discharge the duties thereon, it was held that the agent's authority did not extend so far as to authorize him to change the destination of the goods. Where accordingly the carrier knowing such agent's limited authority delivered the goods on his order to a third person, it was held liable for a conversion. *Clafin v. Boston and Lowell R. Co.*, 7 Allen, 341.

An express company being informed and knowing that certain goods received by it for transportation were the property of the shipper, delivered them without his knowledge to a third person at the place of shipment on the order of the consignee. This was held a misdelivery, and the company was liable accordingly. *Southern Express Co. v. Dickson*, 94 U. S. 549.

Where the owner of goods forwarded them directed to himself, care of N.

W. & Co., and the goods were deposited by the carrier with other parties to be stored and forwarded to the owner, this was likewise held a conversion. *Jeffersonville R. Co. v. White*, 6 Bush, 251.

A similar conclusion was reached in a case where goods were directed thus: "Order A. B. & Co.; Notify C.;" but were delivered to C. without A. B. & Co.'s order. *Wright v. Northern Central R. Co.*, 8 Phila. 19.

Where goods are sent by a carrier marked C. O. D. he is liable for a failure to collect the price on delivery. *Murray v. Warner*, 55 N. H. 546.

Where a misdelivery is occasioned by a misdirection or other negligence on the part of the consignor, the carrier is not responsible. *Southern Express Co. v. Kauffman*, 12 Heisk. 161; *The Huntress Davis*, 82.

A subsequent acquiescence by the consignee in a wrong delivery exempts the carrier from liability therefore. *O'Dougherty v. Boston & Worcester R. Co.*, 1 N. Y. Superior Ct. Repts. 477.

Where the question of misdelivery turns upon a special contract with the carrier, partly verbal and partly written, the verbal and written parts must both be considered in construing the contract. *Union R. & T. Co. v. Siegel & Co.*, 78 Pa. St. 72.

Several cases have occurred in which the facts have been very closely analogous to those of the principal cases.

In the case of the *Thames*, 14 Wall. 98, the facts were these: Van Pelt, of the firm of Bennett, Van Pelt & Co, of New York, being in Savannah, purchased certain cotton which he put on board the steamer *Thames* bound for New York. Three bills of lading were issued, setting out that the cotton was consigned by the firm and was delivered "unto order or to his or their assigns." One bill of lading was retained by the company. Two were given to Van Pelt who drew a draft on his firm for the price of the cotton. This draft was drawn to the order of the cashier of a certain Savannah bank which bank discounted the same, receiving as collateral security the two bills of lading duly indorsed to the cashier. Upon the arrival of the *Thames* in New York, Bennett, Van Pelt & Co. demanded the cotton, and the purser finding on the ship's bill of lading a memorandum to the effect that the cotton was intended for that firm, delivered it to them without demanding the other bills of lading, which as a matter of fact remained in the possession of the bank. The draft on the firm was not honored at maturity, whereupon the bank, through its cashier, libelled the ship for a misdelivery. Under the circumstances it was held that the ship had been in fault, and that the libellant was entitled to damages.

In this case the court said: "No argument is needed to show what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons, that the endorsee of the bills of lading was unknown, if, indeed, he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee at least was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee or the endorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's liability. He has no right under any circumstances to deliver to a stranger."

Somewhat similar was the case of *Newcomb v. Boston and Lowell R. Co.*, 115 Mass. 383, the facts of which were these: B sent certain goods by railroad, taking therefor a railroad receipt, in which he was named as consignor

and consignee. He endorsed on this receipt an order to deliver to C, drew a draft on C for the price, attached the receipt to the draft, and sent both to a bank for collection. C accepted the draft, and afterwards sold the goods to D. A, at the request of C, afterwards took up the draft, and C thereupon endorsed on the receipt an order to deliver the goods to A. The railroad company, however, delivered the goods to D upon their arrival. This was held a misdelivery, and the company was held liable to A for the conversion accordingly.

See also *Alderman v. Eastern R. Co.*, 115 Mass. 238.

In the case of the *Jeffersonville, Madison and Ind. R. Co. v. Irvin et al.*, 46 Ind. 180, the facts were these: J. & Co., of Indianapolis, shipped to C. & Co., of Columbus, certain flour, receiving a bill of lading containing a stipulation that the company undertook to deliver the flour on presentation of the said bill. J. & Co. then drew a draft on C. & Co., attached the bill of lading to it, and had the same discounted. C. & Co. accepted the draft, but failed to meet it on maturity. J. & Co. then took up the draft, and presented the accompanying bill of lading to the railroad, demanding the goods. It appeared, however, that the goods had been already delivered to the consignee without demanding the bill of lading. This was adjudged to be a conversion by the railroad company.

See *McEwen et al. v. Jeffersonville, Madison and Ind. R. Co.*, 33 Ind. 368.

Where there has been an erroneous delivery of goods, and subsequently the person to whom they have been delivered accounts for their full value to the consignee, said consignee can recover only nominal damages from the carrier.

Rosenfield v. Express Co., 1 Woods, 181.

Where through a mistake in the way-bill of a carrier goods are delivered to the wrong factor, and by him sold, the proceeds being accounted for to the consignor, the receipt of such proceeds does not estop the consignor from bringing his action against the carrier. His damages in such case will be the highest price attained by the goods between the time of sale and the time of suit brought.

Arrington v. Wilmington and Weldon R. Co., 6 Jones' Law (N. C.), 63.

MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO.

v.

PHILIP B. KIRKWOOD and CHARLES H. KIRKWOOD.

(45 Michigan Reports, 51.)

A court has no right to instruct a jury, or suggest to them, that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony.

Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier, it is inferable, in the absence of evidence, that they continued so until received by the defendant.

One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order.

A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them; he has ordi-

narily no means of opening packages and examining their contents and has nothing to do with previous dealings with the property by independent carriers.

A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent.

One who claims damages for negligence must prove the negligence; it cannot be presumed.

A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him, or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods come into his charge, and until that is proved, the contract is not.

ERROR to Marquette. Submitted October 28. Decided November 10.

Case. Defendants bring error. Reversed.

W. P. Healy, for plaintiffs in error. Carriers cannot inquire into the contents of packages: *Nitro-glycerine Case*, 15 Wall. 524; and are not liable on a mere presumption that they have injured goods which have gone through the hands of successive carriers: *Darling v. Bost. & Wor. R. R.* 11 Allen, 295; *Bowman v. Hilton*, 11 Ohio, 303.

E. J. Mapes, for defendants in error. It is presumed that goods received in good order by one of several successive carriers remain so until they reach the last: *Hutchinson on Carriers*, § 761; *Dixon v. Railroad*, 74 N. C. 538; *Smith v. Railroad*, 43 Barb. 228; *Brintnall v. Railroad*, 32 Vt. 665.

CAMPBELL, J.—Defendants in error sued plaintiffs in error and recovered damages for breakage of two marble soda fountains, taken by the railroad agents at Marquette and carried, one to Negaunee, and one to Ishpeming. The fountains were packed in New York and forwarded by the New York Central Railroad, and by that company, as is claimed, turned over at Buffalo to the Lake Superior Transit Company, which is a connecting line. The Transit Company delivered the property at Marquette to the plaintiff in error with which it had no business arrangements, but which was the proper carrier from Marquette to the destination of the articles. The boxes, which were marked to be handled with care, were then apparently sound except that a handle of one, consisting of a strip of board, was injured. Each box when opened at its destination was found to contain a fountain of which some of the marble was broken.

The testimony for plaintiffs as well as that for defendants indicates that there was no appearance in either package which would indicate damages at any time, except the broken handle. There was no evidence of neglect on the part of the railroad company, and there was affirmative evidence to the contrary. It was con-

ceded that the railroad company had no means of inspecting the property. Under these circumstances the circuit court told the jury that if the goods were delivered in New York in good order to the first carrier they would have a right to infer that they continued so when received by defendants below, unless evidence was given which showed the contrary. The court also told the jury that if they found it necessary to consider the testimony given by the agents and employees of the railroad, they should bear in mind the interest they have in protecting their company and shielding themselves from blame. In doing this a very similar statement was made concerning the testimony of the packers in New York.

While there may appear on the trial on direct or cross-examination such bias or behavior as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury, or suggest to them, that any suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses. Even interested witnesses are now let in by statute, and the policy pointed out by the statute indicates that the old presumption that interest will necessarily or probably lead to falsehood, was unjust and untrue. But none of these witnesses could have been excluded under the most rigid common-law rules, and whatever license of criticism may be allowed to counsel, it was not, we think, legally justifiable to invite the jury to look upon such testimony with disfavor. There is no legal presumption against it.

Upon the other question we think that the ruling was also wrong. The case comes directly within the principle laid down by this court in *M., H. and O. R. R. v. Langton*, 32 Mich. 251, where it was sought to hold these same parties responsible for delivering hay in a damaged condition, by showing that it was in good condition when delivered to a previous carrier at Sheboygan. In that case as in this the court below held that such a showing shifted the burden of proof upon the railroad company, and we held that this was error, and that the plaintiff was bound to show affirmatively that the hay was delivered in good order at Marquette, to the railroad.

We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious, he may and must take the articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there can be no further responsibility; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers, would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property,

and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the Transit Company acted merely as plaintiffs' agent in turning them over, and cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

In view of our previous decision we should not feel justified in going into this question at all, if it did not seem to be imagined that if the case of *Laughlin v. Railway*, 28 Wis. 204 had been fully called to our attention it might have changed our views. The other cases cited on the argument, except one from North Carolina following it, do not have any particular bearing. In that case the court, treating it as a question not directly covered by previous precedents, held that it would be more convenient and less onerous to the owners of goods to adopt such a rule as is contended for by the plaintiffs below. The only ground discovered for it was the presumption that things remain as they once have been shown to exist. The cases cited as resting on that presumption were not at all in point except by some assumed analogy.

We certainly have the highest respect for the decisions of the court which so decided. But we cannot convince ourselves that the decision is well founded on legal analogies, or correct in principle.

The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things the position of which does not remain either fixed in place or free from disturbance by human agencies. But we need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized.

This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presump-

tion that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved.

In a somewhat similar case, *Muddle v. Stride*, 9 C. & P. 380, Lord Denman told the jury that if it were left in doubt what the cause of damage was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as the other, then also the defendants will not be liable for negligence."

In *Gilbart v. Dale*, 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And in *Midland Railway v. Bromley*, 17 Q. B. 372, the same principle was affirmed, and it was held that if the evidence was as consistent with the claim of one side as with that of the other, the plaintiff must fail, because he must make his proof preponderate.

There is no reason for presuming that the Marquette Railroad did the mischief, that would not arise with equal force, according to the Wisconsin decision, against either of the previous carriers had they been sued instead. Had the first carrier been sued it would unquestionably have been bound to show a safe transit, because that carrier received the articles in actual good order. A presumption that has no better foundation, and that applies to one as readily as to another, ought not to prevail to raise a further presumption of negligence without proof.

The judgment must be reversed with costs and a new trial granted.

The other justices concurred.

See note, Post.

BENJAMIN B. KNIGHT and ROBERT KNIGHT, Copartners,

v.

THE PROVIDENCE AND WORCESTER RAILROAD COMPANY.

(Advance Case, Rhode Island. February 4, 1883.)

The P. and W. Railroad Company received, paid the freight charges on certain lots of cotton shipped from Louisiana to Providence, forwarded and delivered the cotton to the consignees. On delivery the cotton was found to be badly damaged by water, and the consignees claimed the right to recoup the damage from the bill of freight and charges of the P. and W. R. R. Co.

It appeared that the P. and W. R. R. Co. was not associated with the preceding carriers, and it did not appear where on the lines of transit the damage occurred.

Held, that the recoupment could not be allowed.

A carrier receiving goods marked for delivery beyond the end of his line is, in the absence of a special agreement, only responsible for safe carriage over his line and safe delivery to the next carrier.

When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance or to a lien on the goods for the carriage price.

In such cases each road is by mercantile custom entitled to pay the back charges and to a lien on the goods for such charges, and for its own carriage price.

If goods received from a prior carrier are apparently in good order, a carrier is not obliged to open the packages for further examination, but has, for the back charges paid, a lien on the goods.

After some parcels had been delivered to the consignees by the P. and W. R. R. Co. and found damaged they directed the Co. to receive no more parcels of the lot.

Held, that after such direction the company had no authority to receive the other parcels or to pay any back freight upon them.

ASSUMPSIT. Heard by the court, jury trial being waived.

Benjamin N. Lapham, for plaintiffs.

Edwin Metcalf, for defendants.

POTTER, J.—This is an action to recover back certain money paid to the Providence and Worcester Railroad Company for freight and back charges on cotton, or rather to recoup damages which the plaintiffs claim amounted to more than the freight.

The cotton was sent December, 1880, and January, 1881, from Shreveport, Louisiana, by the Waxahachie Tap Railroad Company and its connecting lines to the plaintiffs at Providence, R. I., and the bill of lading so expresses. The bill of lading also contains conditions in print that the liability of that railroad company shall cease upon delivery to its next connecting line, and that that railroad company and its connections shall not be responsible for any old or concealed damage, etc., etc., which conditions the shipper assents to.

When it was received by the owners at Providence, it was found to be wet, and, as the plaintiffs claim, badly damaged. The cotton had come through without change of cars. On two of the way-bills, but relating to the same lot, is an entry that the cotton is very wet and appears to have been in water. Beyond that there is no evidence as to how or where the injury occurred.

One lot of cotton having arrived wet and damaged, the plaintiffs notified the Worcester Railroad Company by letter that they should not receive any more.

It is testified on the part of the defendants, and there is no evidence to the contrary, that the defendants have no connection with any other railroad, and have agreed to no pro rata rates, but fix their own rates independently of any other road.

It is claimed, as we understand, on the part of the plaintiffs, that as the first carrier received the cotton to be delivered at Providence, R. I., no freight was due until it arrived in Providence; and therefore if the Providence and Worcester Railroad Company paid any back freight on receiving it, it was in their own wrong, and they must bear the consequences.

Upon the question whether the fact of a carrier taking a parcel marked to a place beyond his own line, amounts to a contract to be responsible for its safe delivery at its destination, there has been quite a conflict of authority. The true rule seems to be that when a carrier receives goods marked to a place beyond the terminus of his own line, without more, or without any further or special contract, he is only liable to carry safely to the end of his own route and deliver to the next carrier on the usual route. *St. Louis Insurance Co. v. St. Louis, Vandalia, etc., R. R. Co.*, U. S. Supreme Court. See 24 Albany Law Journal, p. 514, issue of Dec. 24, 1881; also see cases stated in Lawson on Contracts of Carriers, § 238; *Schneider v. Evans*, 25 Wis. 241, 256; *Root v. The Great Western R. R. Co.*, 45 N. Y. 524; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; *Nashua Lock Co. v. Worcester and Nashua R. R. Co.*, 48 N. H. 339; *Gray v. Jackson & Co.*, 51 N. H. 1. But although if a carrier had made such a contract and to carry for a guaranteed rate, or guarantee that the whole freight should not exceed a specified rate or sum, he might himself be sued upon it, he could bind no other road; and each road, unless there was some agreement or partnership, could charge its own rates. *Schneider v. Evans*, 25 Wis. 241; *Wells v. Thomas*, 27 Mo. 17.

If there was an association of carriers between two points, by which the carrier at one end was authorized to contract for and bind all the others on the route, then the rule might apply that if pay for the whole route was not taken in advance, no freight could be due until it arrived safely at the end of the voyage. See *Harp v. The Grand Era*, 1 Woods, 184.

But unless bound by some such agreement, every road has the

right to demand pay in advance; and if not in advance, to retain a lien for it. Each road would have a right to its own freight and would not be bound by any agreement made at Waxahachie, not even if the Waxahachie Tap Railroad Company had received the whole pay in advance.

As on such a line of roads, unconnected by any agreement, the owner would be obliged to have some one at the end of each road to pay the freight for him or otherwise have his goods detained under the lien, it has become the usage, founded on general convenience and necessity, for the next road to pay the back freight, and it is considered as the agent of the owner for that purpose, and the owner is supposed to know this usage. *Schneider v. Evans*, above cited; *Bissel v. Price*, 16 Ill. 408; *Bowman v. Hilton*, 11 Ohio, 303; *Lee v. Salter*, *Lalor Supplement to Hill and Denio*, 163; *Elmore v. The Naugatuck R. R. Co.*, 23 Conn. 457, 482.

It is indeed laid down in *Angell on Carriers*, § 282, that a common carrier "is not entitled to freight until the contract for a complete delivery is performed," and this is continued in the last Boston edition, the 5th, A.D. 1877. This, if not taken in connection with §§ 124 and 356, might mislead. Even a general ship, i.e., one which advertises for a particular voyage only and to take for that voyage the goods of any one who sends, could not be obliged to carry without prepayment if demanded. But when without prepayment they take goods on freight, the general law of obligations would require the performance of the contract on their part, at least so far as they could perform it, before they could claim compensation. When they offer to carry goods for all between certain termini on a certain route at more or less regular periods, they then become common carriers; and the right of common carriers whether by ship, railroad or other conveyance, to demand payment in advance, is well settled.

The apparent contradiction may be explained in part by the fact that payment in advance was not in old times denominated freight, nor was the word used for land carriage as it now is. Freight was the reward or compensation for safe conveyance and delivery by ship, and was not earned until that was performed. It had certain incidents attached to it which did not attach to payments made in advance. *Abbott on Shipping*, *405, *406, 5th Amer. ed. by Perkins, 491, 494; *Machlachlan on Shipping*, 433, 421, 364; *Maule & Pollock on Shipping*, 238; 1 *Parsons on Shipping*, 210, 246, 248, n. 2.

Were the defendants in the present case justified in paying the back freight? Ordinarily and without notice, and exercising a prudent care as to the condition of the goods, we have no doubt they were. The usage is too well settled, and has become a part of the common commercial law, and they have the same lien for it which they have for their own. Each carrier who pays the back

freight becomes the agent of his predecessors to collect it. He is in a manner substituted or subrogated in the place of the previous ones; and in some cases may recover for back freight he has paid when he cannot recover for his own. *Western Transportation Company v. Hoyt*, 69 N. Y. 230.

Or it may be said that the shipper makes the succeeding carriers his agents for forwarding in the customary manner. But the rule holds not only in cases where an agency can be implied, but in cases where it cannot. And it is perhaps better to say that the right to forward and the claims for repayment of all reasonable back charges grow out of the necessity of the case. Between widely separate parts of this extended country, the shipper is presumed to know that his goods must be carried by successive lines, and to submit himself to the ordinary course of business, unless he gives special directions to the contrary. *Schneider v. Evans*, 25 Wis. 241, 265; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Bissel et al. v. Price*, 16 Ill. 408, 413.

How far were the defendants bound to examine the condition of the cotton when they received it? It is very evident that to require them to open packages by through cars, except in cases where there is good reason for it, would interfere with the whole commerce of the country. The owner who sends in through cars is benefited by the reduction in price he obtains in consequence of it and by a speedier carriage of his goods.

The sound rule, as we think, is laid down in *Bissel v. Price*, 16 Ill. 408, and in *Bowman v. Hilton*, 11 Ohio, 303. The duty of the carrier is to do what a prudent man would have done in the case. If the goods are in apparent good order he is not obliged to examine further, and has a right to pay the back freight.

One of the cases to which we are referred by the defendants recognizes this rule, viz.: *Monteith v. Kirkpatrick*, 3 Blatch. O. O. 279. Flour was shipped from Oswego to New York, via Albany. At Albany it was transferred to another line of carriers, who received it in apparently good order, and paid the back freight. On arriving at New York it was found to be damaged by wetting, and that the damage occurred before reaching Albany. The libellants claimed their freight and back charges, and the respondents claimed to have the damage deducted, and also contended that the back charges could not be recovered. Judge Nelson held that by established usage they were entitled to the back charges, and that the right to recover them stood on the same ground as the right to recover their own freight. In this case the last carrier was not in fault, and had received the flour in apparently good order.

And to apply these considerations to the present case, we are not satisfied as to the cotton which was first delivered to the Providence and Worcester Railroad Company, that there was anything in its condition which should lead them to believe that there was

much or serious damage, and we think they might reasonably suppose they were doing their duty to the owner in forwarding it to him as speedily as possible.

If the damaged cotton is worth more than the freight, and the owners cannot discover where the injury was done, it was probably a benefit to the owners to have their cotton brought to Providence. If it had been left at Worcester, then instead of carrying on a lawsuit comfortably here at their own homes, they would have been obliged to go to Worcester to replevy it, and have a lawsuit in the courts of Massachusetts.

But after notice given not to receive the goods, the Worcester Railroad Company had no authority to receive them and pay back freight. No person has the right to meddle with the property of another against his express directions, even if apparently for his benefit. If he does so, he does it at his own risk, and a court or jury must decide between the parties. And we make the decision upon that ground alone.

See note to *St. Louis Ins. Co. v. St. Louis, Vandalia, etc., R. R. Co.*, 3 Am. and Eng. R. R. Cas. 371.

The two cases above reported involve a very important and interesting question in the modern law of carriers, viz.: the responsibility of one of several connecting carriers for an injury occasioned to goods in transit, where there is no specific evidence to show in whose hands the goods were at the time the injury took place. The question can of course only arise where there is no such contract with the shipper as to render one of the carriers liable for the negligence or default of all the others. Such contracts are common at the present day. Hence the authorities upon the point here involved are scanty.

In the absence of such a contract no one of several carriers forming a connected and continuous line is liable for the loss or injury of goods occurring while such goods are in the hands of other carriers. *Ricketts v. Baltimore and Ohio R. Co.*, 59 N. Y. 637; *Schiff v. N. Y. Central and Hudson R. Railroad Co.*, 16 Hun, 278. Each carrier in the line is bound to unload the goods and deliver them safely to the next succeeding carrier. But having done this, he has discharged his full duty.

McDonald v. Western R. Corp., 34 N. Y. 501.

Where an arrangement is made between several connecting railroad companies by which goods to be carried over the whole route are to be delivered by each to the next succeeding company, and such company is to pay to the preceding company the amount already due for the carriage, and the last one is to collect the whole from the consignee, a reception of goods by the last company, and a payment by it of the charges of its predecessors will not render it liable for an injury done to the goods before it received them.

Darling v. Boston and Worcester R. Co., 11 Allen, 295; *Gass v. New York R. Co.*, 99 Mass. 220; *Cf. Brintnal v. Saratoga R. Co.*, 32 Vt. 605; *Angle v. Mississippi R. Co.*, 9 Iowa, 487; *Dillon v. New York R. Co.*, 1 Hilt. 281; *Bradford v. South Carolina R. Co.*, 10 Rich. 221; *S. C.*, 10 Rich. 307; *Kyle v. Laurens R. Co.*, 10 Rich. 382; *Wilson v. Owners, etc., of Tuscarora*, 32 Pa. St. 270; *Carson v. Harris*, 4 Greens (Iowa), 516.

See also *Monteith v. Kirkpatrick*, 3 Blatch. C. C. 279. And the last carrier has a lien in such case for his own freight, and for the back charges paid, the consignee being prohibited from setting off against this claim the damage done to the goods. *Bowman v. Hilton*, 11 Ohio, 303.

Where there is no evidence to show in whose hands the goods were when the injury or loss occurred, very nice questions have arisen. The great weight of opinion is to the effect that if there be evidence of delivery to the first carrier, and evidence of non-delivery at the terminus; the burden of proof is on the first carrier to show that the loss did not take place while the goods were in his possession. In default of such evidence on his part he will be held liable.

Brintnall v. Saratoga and W. R. Co., 32 Vt. 665.

The doctrine of this case is amply supported in the opinion, thus:

"The duty of the defendants was to safely transport the box to Castleton, the end of their road, and then deliver it to the next carrier. The negligence alleged in the declaration, the breach of duty complained of, is that they did not do this, and, of course, in order to establish a right of recovery against the defendants, there must be some proof offered to prove such negligence. It is an affirmative allegation by the plaintiff, and the burden is upon him, though it involves the proof of a negative. It is not enough for the plaintiff to show the box in the hands of the defendants and throw upon them the burden to prove that they delivered it to the plaintiff, or at its proper destination, under their contract of carriage. But in such cases a plaintiff is only bound to give such proof of the loss as the nature of the case admits of, and fairly is in his power to bring. The fact that he is thus really called upon to prove a negative is not to be lost sight of, nor that ordinarily after the delivery of goods to a carrier, and especially to a railway company, the means of proving what has been done with them, or what has become of them, are wholly within their own power and knowledge, and out of that of the plaintiff. The plaintiff can, and ought always to be required to show that he has not received his property; that it has been lost. The county court required this to be done by the plaintiff, and held that if this was shown, and that the goods never reached Boston, their ultimate destination, then the burden was on the defendants to show the box out of their hands. . . . We are satisfied, under the circumstances, that the instruction was correct."

There have also been several cases where suits have been brought and recoveries permitted against the last carrier in the connecting line, the argument being that if the goods were delivered to the first carrier in good condition they must be presumed to have continued in that state.

In *Dixon v. Richmond and Danville R. Co.*, 74 N. C. 538, the facts were these: A piano was shipped in good order from Boston to Greensboro, N. C., over several connecting lines. It was in good order when it arrived at New York, but was greatly damaged when it was delivered by defendants, the last carrier in the line, at Greensboro. Under these circumstances it was held that the burden of proving that the piano was injured on some other of the connecting lines than their own was on defendants, and having failed to do this, they were held liable for the damage.

To precisely similar effect is the case of *Laughlin v. Chicago and N. W. R. Co.*, 28 Wisc. 204: Here goods in a box were shipped over connecting lines, consisting of three successive carriers, and finally, on delivery to the consignee, the box was found to have been opened, and various articles abstracted therefrom. It was held, in the absence of evidence to the contrary, that the jury might presume that the box remained unopened until it came into the custody of the last carrier, and that while in his custody the loss occurred. The last carrier was held liable accordingly.

Laughlin v. Chicago and N. W. R. Co., 28 Wisc. 204.

In New York the authorities are the same way. It has been expressly held that where goods are delivered to a railroad company to be transported by it and other connecting lines to the point of destination, it is enough for the owner in an action against the last carrier for an injury occasioned to the

goods in transit to show a delivery of them in good order to the first carrier. The defendant can then only escape liability by proving affirmatively that the loss did not occur on his line.

Smith v. New York Central R. Co., 43 Barb. 228.

This case was afterwards affirmed by the Court of Appeals, but the judgment of that court is not reported. See index of unreported cases, 41 N. Y. 620.

In Georgia it is provided by statute (Code, sec. 2084) that the last of a connecting line of railroads over which goods are shipped, which receives them in good order, shall be liable to the consignee for any damage during the whole transit. This does not, however, apply to the baggage of a passenger checked and accompanying him on his journey. Where any damage has occurred to such baggage while in transit, the passenger may sue either the company issuing the check or the company delivering the baggage in a damaged state.

Wolff v. Central R. Co. of Georgia, 14 Rep. 203 (Am. and Eng. R. Cas. 44).

In our opinion these cases are most unquestionably good law, and are based upon the soundest principles of public policy. When a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he, of course, loses all sight of and all control over them. If an injury occurs, or a loss is occasioned while en route, he has no conceivable means of proving in whose hands they were at the time of the loss or injury. It is therefore perfectly proper to shift the burden of proof on the carrier who is sued.

Elmore v. Naugatuck R. Co., 23 Conn. 483.

Hunt v. New York and Erie R. Co., 1 Hilton, 228 (Common Pleas) must be considered as of little authority since the subsequent decision of *Smith v. New York Central R. Co.*, supra.

The first of the principal cases draws a distinction where it appears that the goods are in closed packages which the carrier cannot properly open. We must be permitted to express some doubt as to the soundness of such a distinction, and further refer our readers to *Lin. v. Terre Haute and Indianapolis R. Co.*, 10 Mo. App. 125.

See *Lindley v. Rich. and Danville R. R. Co.*, supra, p.

NEW ORLEANS, ST. LOUIS AND CHICAGO R. R. CO.

v.

M. FALER & Co.*

(58 *Mississippi Reports*, 911.)

F. & Co. delivered to the New Orleans, St. Louis and Chicago R. R. Co. a certain number of cotton-bales, to be transported between certain points on the line of that company's road. The cotton was put on flat, open cars, against the remonstrance of the consignors, and while in transitu was consumed by fire. Thereupon F. & Co. brought an action to recover damages

*When this case was decided, Peyton, Chief Justice, and Simrall and Tarbell, Associate Justices, constituted the court. The failure to report it heretofore resulted from the omission of Simrall, J., to mark the opinion "to be reported," which omission was not discovered until recently, when the present court ordered the case to be reported.

for the loss sustained by them. The train which was carrying the cotton was made up of both box and flat cars, and although both classes of cars contained cotton, none was burned except that on the flat-cars. The evidence did not show how the cotton was ignited. There was written across the face of the bill of lading these words: "Not responsible for loss or damage by fire or water." *Held*, that cotton being very inflammable, and, when ignited, difficult to extinguish, it was the duty of the railroad company to have stored F. & Co.'s cotton in box-cars, or in the safest cars in use for the transportation of such goods, and the failure to provide the same was negligence, and renders the company liable for the loss of the cotton, notwithstanding its special contract for exemption from loss by fire.

A railroad company may stipulate with the consignor of goods against liability for loss by fire; but still the company is bound to the performance of all the duties incident to its employment—as, the exercise of fidelity, skill, and care—and is required to use the safest approved motive-power, with the best appliances in use to arrest the escape of sparks of fire, and cars so constructed as to afford the greatest protection to the goods received for transportation.

Wherever a loss of goods being transported by a railroad company results from a cause against which the company has by a special contract stipulated for immunity, the company is still liable, notwithstanding the special contract, unless it can be acquitted of all blame for the loss. If the loss be attributable to the omission of the carrier to provide the safest vehicle in use for the transportation of the particular goods lost, or to a failure to do anything that diligence and care would suggest was feasible to have been done, the company is liable, even though it may have made a special contract for immunity against the cause of the loss.

ERROR to the Circuit Court of Copiah County.

Hon. Uriah Millsaps, Judge.

The case is sufficiently stated in the opinion of the court.

Harris & George, for the plaintiff in error.

It is stated in the case relied upon by counsel for the defendants in error that the American cases settle the point that a common carrier may, by a special agreement, restrict his liability; that, though he may not screen himself from responsibility for his own negligence, he may fairly protect himself against accidents, and especially against accidental fire. (*Mobile & Ohio R. R. Co. v. Weiner*, 49 Miss. 734.) If the carrier has protected himself by a fairly-understood agreement against accidental fire, he throws the burden of proof on the plaintiff to show that the loss was occasioned by the actual negligence of the carrier. There is no presumption of law which relieves the plaintiff from such proof. The servants of the railroad company are presumed to be competent and diligent, until the contrary has been shown.

The agreement in this case is fully proven. It cannot be presumed that a business man did not understand the receipt which he accepted and relied on. There is nothing to show hurry or confusion. The indorsement was especially conspicuous.

The judge below found negligence in the use of uncovered flat-cars, without any additional fact save the circumstance that Faler called the attention of the company's agent to that fact. The evi-

dence fails to show how the fire originated, but it does show that, by the construction of the smokestack, and having buckets of water, on the train, the usual precautions had been taken. The cotton on the flat-cars was protected also by several box-cars in front; and the proof shows that it was impossible for sparks from the locomotive to have ignited the cotton on the flat-cars. If we suppose the fire to have originated from some other cause, there is no evidence of negligence. The judgment of the court below rests upon conjecture altogether.

R. N. Miller, and Potter & Green, for the defendants in error, filed briefs respectively, but they were lost before the record and papers of the case reached the hands of the reporter.

SMALL, J.—In October, 1874, Faler & Co. shipped by the New Orleans, St. Louis and Chicago R. R. Co., from Hazlehurst, thirty-five bales of cotton consigned to their factors at New Orleans. Written across the face of the bill of lading are the words: "Not responsible for loss or damage by fire or water." The cotton was consumed by fire while in transitu, and Faler & Co. bring their action to recover damages for the loss sustained. This is an effort by a public common carrier to limit its common-law responsibility.

The privileges which were granted by the State to the railroad companies which lately consolidated into the great corporation known as the New Orleans, St. Louis and Chicago R. R. Co., were to bring into existence public carriers with the capacity and facilities to transport passengers and property promptly, safely, and at reasonable rates. All the powers adequate and necessary to appropriate the property of private owners for the use of the line of the road, to build, equip, and operate it, have been conferred, in consideration of the benefits of speedy, safe, and cheap transportation.

These corporations owe to the community duties which are quasi-public; and all questions (which arise in individual cases) affecting their duties and obligations as public carriers assume the importance of public questions.

The corporation might justly complain of any interference by the State which would cripple it in the full exercise of its legitimate franchises in the conduct of its business. On the other hand, the corporation ought to be held to a fair and full performance of its duties as a public carrier. These duties were well defined at the time the charters were granted. Of them are these: That goods received for transportation should be safely carried and delivered at the point of destination, and nothing excuses except the act of God (inevitable accident) or the public enemy.

But it was and is permissible to limit this almost absolute responsibility by an exception from liability for those losses which

are the result of casualties or accidents—against which the most prudent cannot always provide—such as fire, tempests, etc., etc.

A railroad company may stipulate against loss by fire; but such an exemption does not discharge or abate one "jot or tittle" the prudence, skill, and care which the nature of the business imposes. When we use the words "prudence," "skill," "care," it is always in reference to some subject-matter, and the "degree" is measured by the nature of the thing to be done, and the instrumentalities employed. A railroad company must employ men educated to the business to manage its locomotives. It must use cars suitable to the character of property which it transports. If one class of goods would be damaged by exposure to the weather, they must be carried under cover.

The duty is to use the cars and other appliances usual and suitable to its business; nor can it by special contract relieve itself from that duty. The law demands that the railroad company shall use safe machinery, properly-constructed vehicles, employ competent agents, and manage the whole with that degree of skill and prudence necessary to the successful prosecution of the business. (*Mobile & Ohio R. R. Co. v. Weiner*, 49 Miss. 732.)

In *Smith v. Railroad Company*, 12 Allen, 533, 584, the defendant offered as an excuse that the car door, which was broken by the cattle (causing the loss of some of them), was reasonably strong; but to that the court responded that "it was in the power of the railroad company to secure a car sufficiently strong to resist the struggles of the animals, however unruly." The company "is bound to have one absolutely and actually sufficient." *Welch v. Railroad Co.*, 10 Ohio St. 69 et seq.

In *Steinway v. Railroad Company*, 43 N. Y. 126, the goods were destroyed by fire communicated by sparks from the chimney of the locomotive. As in this case, there was an exemption from loss by fire. The point considered was, whether the company was culpable for not using the safest apparatus to prevent the escape of sparks. It was laid down as the rule, "that if there was anything lacking in the construction of the engine which sound rules required it should have, it was negligence." The company must adopt the most approved modes of construction and machinery in known use, and also the "best precautions in practical use for securing safety." So, in *Jackson v. Railroad Company*, 31 Iowa, 176, it is said that "ordinary care and prudence require the use of the best appliances known."

Whatever special contract of exemption the carrier may make, he must provide, if the transportation be by water, a seaworthy vessel, properly equipped and furnished; or, if by land, vehicles safely and properly constructed. Ang. on Car., sect. 265. And, more than that, there must be no blame or fault imputable to the carrier in reference to the storage of the goods on the vessel, as in

New Jersey Steam Navigation Company v. Merchants' Bank, 6 How. (U. S.) 385, where the goods were placed too near the chimney, over the boiler-deck, and took fire. Angell on Carriers, sect. 265, lays down the rule to be, that there can be no exemption for losses occurring from a defect in the vehicle or mode of conveyance.

The courts have not been uniform in defining the degree of "negligence," whether gross or slight, for which the carrier will be liable when the loss occurs from a cause excepted by special contract. One class of cases holds that the effect of such contract is to relieve the carrier from his public character and responsibility as such, and place him on the footing of a private carrier, under a special engagement with the shipper, and that he is only liable for gross negligence. Another class, looking with jealousy upon anything which relaxes the common-law responsibility of the public carrier, declines to give any larger effect to the special contract than to relieve the carrier from liability as an insurer for safe delivery.

The point made in *Michigan Southern Railroad Company v. Heaton*, 37 Ind. 448, was as to the degree of negligence which would charge the carrier for a loss by fire, when that risk was exempted by the bill of lading. The court held that the carrier could no more contract "for a slight degree of negligence than for gross negligence." In *Graham v. Davis*, 4 Ohio St. 362, it was held that negligence, whether gross or slight, could not be the subject of a contract. So, *Steinway v. Erie Railway Company*, 43 N. Y. 126, holds the carrier liable, if there was any negligence on his part, "without regard to any supposed distinctions or degrees of negligence."

These adjudications are of the class of cases which, we think, declare the sound and salutary rule, that whilst the railroad company may, by special agreement with the shipper, stipulate against liability for losses which sometimes happen by casualty or accident to the most prudent men—such as fire,—nevertheless, as a public carrier, the company is held to the performance of all the duties incident to the employment. Fidelity, prudence and care are exacted. Safe motive-power, with all the best constructed appliances in practical use to arrest the escape of sparks from the chimney, should be used. Cars should be so constructed as to afford the greatest protection to goods liable to damage from rains, or easy to ignite from sparks.

At this day the great railroad companies are the chief arteries of the interior commerce of the country. They were incorporated, with their extensive franchises, for the very purpose of subserving the needs of commerce and travel as public carriers. They cannot, in consonance with the great object had in view in their charters, surrender their character of public carriers, and, by contract with individual shippers, assume that of private carriers. They are

bound by the law of their creation to accept goods and passengers offered for transportation. They are public carriers and nothing else; nor can they abdicate that character without a violation of their fundamental law.

It appears that the train on which the plaintiff's cotton was shipped was made up of both box and flat-cars—five or six of the former, and two of the latter.

It was also in evidence that the plaintiff remonstrated with the depot and shipping agent of the company about putting his cotton on the flat-cars. It was not disclosed how the cotton was ignited. Most probably by sparks from the locomotive. No other cotton was burned except that on the flat-cars. Cotton is very inflammable: easy to ignite, and hard to extinguish when on fire. Ordinary prudence would suggest that it should be stored in cars of such construction as would give the largest measure of security. It is almost certain if the plaintiff's cotton had been placed in a box-car it would not have been consumed. The company had box-cars, which were more secure against fire. Its duty was to provide the safest cars in use for the transportation of goods, according to their quality and liability to special perils.

In holding, therefore, that it was negligence to carry cotton-bales on flat-cars when the defendant had in use safer cars, we follow the doctrines and analogies of those authorities which are approved in *Mobile and Ohio Railroad Company v. Weiner*, 49 Miss. 732, and others hereinbefore stated. If it be negligence not to use the most approved apparatus known to the defendant to prevent the escape of sparks from the chimney of the locomotive, as held in the case reported in 43 N. Y., it cannot be prudence to omit any other precaution (in its control) which it can take for the safety of inflammable goods. The company must be free from negligence.

There is no blame or negligence in carrying lumber, many sorts of barrel freight, and other goods of like character (not apt to take fire from sparks), on flat-cars, whilst it is not prudent to store cotton-bales or such inflammable material on them.

The duty under the law is to carry and deliver safely. That duty is not performed if the carrier adopts a vehicle or car for inflammable goods less safe than another in known common use.

Whatever improvements science and skill have made, and experience has tested and approved, in machinery or vehicles, which contribute to the safety of passengers and property, must, if known to the railroad company, be adopted.

The vast interests of commerce and travel which are intrusted to these public carriers require that much of them. The large powers and franchises (including that of eminent domain, in appropriating private property to their use) have been granted in consideration of the corresponding benefits and advantages which they afford to

the public. It is not exacting too much of them, nor imposing a new burden, that they shall employ care, skill and prudence proportioned to the magnitude of the interests confided to them, and the perils and dangers peculiar to that mode of transportation.

If the effect of a special contract limiting their liability under the law shall be permitted to relax their duty to the public, and to abate that measure of care, skill and prudence incident to the employment, then will the door be opened to relieve them from those obligations to shippers which the wisdom of the common law has imposed, and then will the owners of property be subjected to risks which the public good requires should rest upon the company.

The question in every case should be, and is, Has the public carrier acquitted himself of all blame? Can the loss be referred to omission to provide the safest vehicle in use for the particular property? If the loss can be ascribed to a failure to do what diligence and care would suggest was feasible to have been done, then the public carrier cannot shield himself behind an exemption in the bill of lading.

In the case of the Mobile and Ohio Railroad Company v. Weiner, supra, allusion was made to the great relaxation of the responsibility of the common carrier, induced by a recognition by the British courts of the validity of notices to shippers, which were treated as special contracts. To such mischiefs did the practice lead, that Parliament interposed to arrest the evil. The American courts, after some vacillation, have almost uniformly denied that a common carrier's liability can be limited in that mode. Whilst tolerating a reasonable restriction by special contract, fairly and deliberately assented to, the courts, whose judgments are supported by the soundest reasons and wisest policy, declare also the doctrine that common carriers cannot by contract bargain for an abatement of that degree of care, skill and prudence which the law imposes.

Judgment affirmed.

NICHOLAS et al

v.

NEW YORK CENTRAL AND HUDSON RIVER R. R. CO.

(Admiralty Case, N. Y. Ct. of Appeals, 1882.)

Although in the State of New York common carriers may by express contract exempt themselves from liability for their own negligence, yet such contracts in order to have such effect must be plainly and distinctly expressed so that their purport cannot be misunderstood by the shipper.

A delivered certain trees to a railroad company for carriage and received a long printed shipping contract which he signed. This contract contained numerous provisions exempting the company from the extraordinary liabilities of carriers and also from liability "for damage occasioned by delays from any cause or change of weather." *Held*, that the terms of the shipping contract were not effectual to exempt the company from liability for a loss occurring through an unreasonable detention occasioned by the company's negligence.

ANDREWS, Ch. J.—We have recently held in *Mynard v. The Syracuse, Binghamton and New York R. R. Co.*, 71 N. Y. 180, that a shipping contract made by a common carrier for the carriage of live stock, whereby the shipper, in consideration of a reduced rate for the carriage, agreed "to release and discharge the carrier from all claims, demands and liabilities of every kind whatsoever, for, or on account of, or connected with any damage or injury to, or the loss of said stock or any portion thereof, from whatsoever causes arising," did not operate to exempt the carrier from liability for loss occasioned by its own negligence.

The words "from whatsoever cause arising" were as broad and comprehensive as possible. The court, however, refused to construe them as covering a loss arising from the negligence of the carrier, not, as I understand the decision, because the words in their ordinary signification and interpretation did not include a loss of this character but because it is a part of the rule which in this State allows a common carrier to contract against his liability for negligence, that the contract must in terms and expressly exempt the carrier from liability on this account.

The practice of common carriers making special acceptances exempting them from the extraordinary responsibility imposed upon them, though contrary to the policy of the common law, liable to abuse and productive of inconveniences, has obtained too long to be now questioned. In this State it has been extended so as to authorize a special acceptance exempting them from liability for their own negligence. But a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable; and while the law does

not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business and the want of knowledge of the force and construction of contracts on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed.

This case is an illustration. The plaintiff, desiring to ship trees from New York to Geneva, applied to the defendant in New York to have them carried, and a printed paper, which occupies nearly two printed pages of the appeal book, is presented to him by the carrier as the shipping contract, containing a large number of special exemptions, and among others, for "damage occasioned by delays from any cause, or change of weather." The plaintiff signs the paper, and the trees are, as we must assume upon the case, lost by the negligent delay on the part of the defendant and its servants in transporting them, and the defence is that the contract included an exemption from loss by the carrier's negligence. It may be admitted that a careful reading of the contract would apprise a person skilled in the interpretation of contracts, that loss by negligent delay was included. Some of the exemptions in the paper relate to extraordinary liabilities imposed upon carriers by the common law, not connected with fault on their part. But in case of loss by delay in the transportation, the carrier is not an insurer, and is by the common law liable only when the delay was negligent, and the argument is that the shipper must be presumed to have understood this, and therefore to have known, when he signed the contract, that it was intended to cover a loss arising from negligent delay in transporting the property. This is theoretically true. But we think it may be safely assumed that, in the great majority of cases, it is practically untrue, and that shippers would not generally understand that the contract absolved the carrier from responsibility for the consequences of its own negligence. The circumstances under which contracts of this kind are usually made preclude a careful consideration by the shipper of their language and effect, and it is not too much to require that the carrier, who usually prepares the contracts in advance, and exacts the consent of the shipper as a condition of taking his property, shall, in explicit language, if he seeks to rid himself of the obligation of care, and free himself from responsibility for his own negligence, express this intention in his contract, and that it shall not be left to inference, argument or construction from general language.

There is an almost unbroken line of judicial expressions to the effect that general words will not operate to exempt a carrier from liability for his own negligence. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. 344, Nelson, J., referring to the contract in that case, said: "The language is general

and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care." In *Alexander v. Greene*, 7 Hill, 533, where the carrier claimed exemption from liability for negligence, under a stipulation to tow plaintiff's boat, "at the risk" of the master and owners, it is said: "To maintain a proposition so extravagant as this would appear to be the stipulations of the parties ought to be most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred." In *Wells v. Steam Navigation Co.*, 8 N. Y. 375, Judge Gardner says: "We held then, if a party vested with a temporary control of another's property, for a special purpose of this sort, would shield himself from a responsibility, on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement, and that a stipulation so extraordinary, so contrary to general usage and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given." Johnson, J., in *Maginn's Case*, 56 N. Y. 168, says: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that be expressly stipulated." And in the case of *Mynard*, which contains the latest expression of this court upon the subject, it is said: "The carrier should not be released from the consequences of his own wrongful acts, under general words or by implication." In some of the cases cited reference is made to the circumstance that the contract of exemption then before the court might have effect without applying it to the case of negligence, but this is referred to as ground for excluding the inference of an intention that that subject was in the minds of the parties to the contract. But the cases do not, we think, rest upon that circumstance, but, as we have said before, upon the broader and more practical and satisfactory ground, that where the carrier claims to have been exempted by a special acceptance from liability for his negligence, or the negligence of his servants, he must, in the language of Gardner, J., "show this immunity on the face of his agreement."

We think the non-suit was improperly granted at the Circuit, and that the judgment should be reversed and a new trial granted.

Danforth, Finch and Tracy, J.J., concur.

Rapallo, Miller and Earl, J.J., dissent.

See note, 3 Am. and Eng. R. R. Cas. 271.

CHALK

v.

CHARLOTTE, COLUMBIA AND AUGUSTA R. R. Co.

(85 North Carolina Reports, 423. October Term, 1881.)

In an action for damages against a railway company to recover the value of goods lost by the alleged negligence of the defendant, it appeared that after the arrival of the goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days; notice of their arrival was given the plaintiff, who paid the freight charges with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen for that purpose, and in the afternoon of the second day they were destroyed by fire, together with much of defendant's property; *Held*,

There was a delivery in law of the goods to the plaintiff consignee, which exonerated the defendant company from liability as warehousemen.

The fact that the fire originated in a steam cotton compress, erected on the company's premises with its permission but not under its control, does not constitute negligence in the defendant, the permission to erect the same not being the proximate cause of the injury sustained by the plaintiff.

(*Hilliard v. R. R. Co.*, 6 Jones, 343, cited and approved.)

CIVIL Action for damages tried at Fall Term, 1880, of Mecklenburg Superior Court, before Seymour, J.

Judgment for plaintiffs, appeal by defendant.

Messrs. Bynum & Grier, Hinsdale & Deveretux, Walter Clark and T. M. Pittman, for plaintiffs.

Messrs. Wilson & Son, for defendant.

SMITH, C. J.—The action is to recover from the defendant company compensation for damages to one hundred barrels of flour which had been transported from St. Louis, and over its railroad from Augusta in Georgia to Charlotte in this state, and was a part destroyed and the rest injured by fire while on the city platform at the latter terminus before removal. The flour arrived at Charlotte on defendant's train on the evening of April 14th, 1875, and was unloaded and put on the platform, the usual place for the deposit and delivery of freight to consignees, the next morning.

Notice of the arrival and of the freight charges, which were required to be paid before the removal of goods by the consignee, was conveyed on a postal card of the date of April 14th, which the general agent testifies he directed his office clerk to give on that day, but which the plaintiff, Chalk, testifies he took from the post-office on the morning of the 16th, being himself absent on the day preceding, though his two co-partners remained in the city.

The company's agent also testified to his impression that a clerk or employee of the plaintiffs came to the depot and made inquiry about the flour on the day of the transfer from the cars to the platform; but he certainly did call on the morning of the 16th about 8 o'clock, according to his recollection, and with a bank check paid the charges for freight in full. The city platform, containing the flour for convenient delivery and removal, and where it was the custom of the plaintiffs and other consignees in Charlotte to receive their goods, none of whom made any exception thereto, was in width 30 feet and in length 400 feet, and built by the city upon land of the defendant, for the convenience of the cotton trade and the railroads converging at that point. This platform was not under the defendant's control, and its eastern part on the south side was connected by a gangway with the defendant's brick and tin covered depot building, and at the west end of the platform was erected a cotton press, moved by steam, and 350 feet distant from the depot building on land of the defendant, and put up with its consent, but not under its control or supervision.

The plaintiff, Chalk, testifies that on being advised of the arrival of the flour, he was unable to procure transportation from a city drayman to whom he applied, and made ineffectual efforts to obtain the means of removing it, and that before the return of their clerk who had been sent to pay the charges, he heard the alarm of fire, and the defendant's agent fixes the hour at 2.30 p.m., on his return from dinner. There was a large quantity of cotton lying on the city and N. C. Railroad company's platforms, and from this latter place the fire was communicated to the defendant's cars on the track by the depot, and thence to the depot building, which was entirely consumed. A very high wind was blowing from the southwest, and the fire spread with such rapidity that it was impossible to arrest its progress after its commencement, until the damage was done to the plaintiff's goods. The cotton press was built to compress cotton for railroad transportation, the different companies paying therefor according to certain pro rata rules entered into between them and connecting roads and steamship companies, and was in operation just before the fire which came from the direction of its location. A witness stated that his impression was that the smokestack had no spark arrester attached to it.

A series of instructions were asked to be submitted to the jury on behalf of the defendant, which may be condensed in the following propositions:

1. The payment of freight with the knowledge of the situation of the flour is a delivery in law and exonerates defendant from further liability for loss.

2. Notice to the consignee of the arrival of the goods is not necessary.

3. If the plaintiff had such a notice on the 15th, the day before the fire, reasonable diligence in removing them was required and not exercised.

4. If negligence can be imputed to the defendant in permitting the construction and working of the compress upon their premises, it is not the proximate cause of the injury and imposes no liability on it therefor.

5. Upon the facts proved, the defendant is not chargeable with negligence, and the burden of proof rests upon the plaintiffs in this respect.

The court charged as requested as to the onus probandi, but declined to give the other instructions, and directed the jury, that the defendant's liability as a common carrier ceased, if not before, on the payment of freight, and thereafter their liability, if any, was that of a warehouseman of whom ordinary care only is required, and this continues until the consignees have had a reasonable time after the arrival of their goods to take them away, and if it was the custom of the defendant to notify consignees of the arrival of their goods, and this notice only reached the plaintiffs on the 16th, and they thereafter used due diligence in attempting to get them away, and were prevented by the fire, then the defendant would be responsible for the damage; that if the platform was rendered dangerous by reason of the proximity of the compress, so that a person of ordinary prudence would not have exposed his property there, then the plaintiffs would be entitled to recover.

The directions given the jury that the liability of the defendant as a common carrier passed into that of a warehouseman at if not before the time when the freight bill was paid, if it did not then terminate by delivery and acceptance, though not subject to review in this appeal, is, in our opinion, a correct exposition of the law governing that class of public agencies in their relation to those whose goods they transport, and is warranted by well settled decisions in this and other states, and the rule itself is reasonable and just. Chief Justice Shaw, in an elaborate opinion quoted with approval by an eminent author in his work on railroads, thus announces the measure of liability of such companies: They are responsible as common carriers until the goods are removed from the cars and placed on the platform, and if on account of their arrival in the night, or at any other time when by the usage or course of business the doors of the merchandise depot or warehouse are closed, or for any other cause, the consignee is not then ready to receive them, it is the duty of the company to store safely, under the charge of careful and competent servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them, and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire.

2 Red. Railroads, p. 52, § 157. So in *Hilliard v. Railroad Company*, 6 Jones, 343, Ruffin, J., declares that "after the goods are placed in the warehouse, the owner's interest is protected by another responsibility of the company which arises—that of a warehouseman, bound to take ordinary care of the goods. See also *Whart. Neg.* § 569.

Applying the principle to the facts of the present case it will be seen that the flour placed on a platform (as usual with others and the plaintiffs themselves theretofore, and without objection or complaint from either), accessible to the owners and convenient for delivery to them, remained there for nearly two days, and on the second, the transportation paid for with full knowledge of the place of deposit and without any suggestion of an exposure to peril, until in the afternoon they are destroyed by the fire with much property of the defendant. Wherein lies any negligence? If what occurred is not in law a delivery to the owner so as to make future risks his own, the goods were where they would have been required to be placed, had he procured the means of transportation, and the doing this in preparation for their removal shows no want of prudence or care in the company, and the suddenness and fierceness of the advancing flames permitted no removal to a place of greater safety afterwards.

But the charge imputes a culpable carelessness and want of foresight in allowing the construction of a compress so dangerous in the vicinity of such inflammable materials as cotton, under the conditions from which the jury were left at liberty to infer a legal liability in the defendant upon that ground. There is, of course, danger from fire in the use of steam power for transportation and for the compression of cotton bales to a smaller size, and yet the public interests demand the use of it for both purposes. The compresses reduce largely the costs of carriage in the storage of a larger number of bales in the cars used in transportation. Steam cannot be dispensed with, notwithstanding the perils of its use, without great detriment to the agricultural and commercial prosperity of the country, and all that can be required is the employment of such means as are calculated to remove or reduce the perils encountered in the employment of the dangerous but most valuable agent. But this question, which might arise if the owners of the compress were sued and charged with neglect in not providing their smokestack with a spark-arrester, or in the careless management and working of the machinery itself, is not presented in this appeal, since the permission to put it up on defendant's premises is not the proximate cause of the injury, or, as it is sometimes said, there is no causal connection between them.

A negligence followed by liability to others is defined as "the judicial cause of an injury when it consists of such an act or omission on the part of a responsible person as in ordinary natural

sequence immediately results in such injury." *Whar. Neg.*, § 73. It must be the natural and proximate consequence of the act complained of. 2 *Greenl. Evi.*, § 256.

Measured by this rule, the damage is too remotely connected with the imputed negligence to expose the defendant to the action. The redress, if any, must be pursued against the owners of the compress.

As upon ascertained facts, negligence is a question of law to be declared by the court, in which the defendant was entitled to the instruction that the evidence disclosed no neglect in the company for which it is liable. This view is fully sustained by the ruling in a case not dissimilar in the facts to which our attention has been called: *Knapp v. Curtis*, 9 *Wend.* 60.

There is error, and must be a new trial. Let this be certified. Error. *Venire de novo*.

The very excellent treatise of Mr. Lawson on the contracts of carriers presents so fully and so clearly the whole law as to the right of carriers to limit their liability, that no further comment upon the cases published prior to the appearance of that book is needed. Nearly three years, however, have elapsed since Mr. Lawson's treatise issued from the press. A number of important cases have during that time been decided. It is proposed in the following note to give a brief digest of these recent decisions.

United States Courts.—A carrier cannot by stipulating against liability for a loss by fire exempt himself from liability for a loss occasioned by a fire caused by the negligence of himself or his servants. *Muser v. Holland*, 17 *Blatch.* C. C. 412.

A carrier may lawfully limit its liability to a reasonable sum (e.g. \$50) for the loss of a trunk or box, the contents of which is not revealed to it. *Id.*

Where a bill of lading stipulated that a carrier should not be responsible for loss or damage by fire, and the goods were stopped in transit by a mob, set fire to and consumed, *held*, that the burden of proof was on the consignor in an action against the carrier to prove that the loss was occasioned by the negligence of carrier or his servants. *Wertheimer v. Penna. R. Co.* 17 *Blatch.* C. C. 421.

Where the shipper signs a bill of lading limiting the amount in which the carrier shall be liable, the provisions of such bill of lading are binding. *Hart v. Pennsylvania R. Co.* 7 *Fed. Rep.* 680.

Illinois.—The mere fact that a shipper receives a bill of lading containing a clause limiting the carrier's responsibility does not of itself operate to exempt the carrier. In order to have that effect, it must appear that the shipper knew the contents of the bill of lading and assented thereto. Whether he has done so or not, is a question for the jury. *Merchant's Despatch Trans. Co. v. Lessor*, 89 *Ill.* 48.

Where in such case the shipper reads the receipt and makes no objection, his assent thereto will be presumed. *Merchant's Despatch Trans. Co. v. Jockeying*, 89 *Ill.* 152.

The fact that the merchant of whom goods are purchased knew of such limitation of liability in the receipt given when they shipped the goods, is not sufficient to lessen the common law liability of the carrier, unless there be proof that such merchant had power to enter into such special contract with the carrier. In the absence of evidence, it will be presumed that he had no such power. *Id.*

Where no receipt is given by the carrier at the time of receiving the goods, he cannot subsequently limit his liability by a receipt afterwards given, when it appears that the shipper had no knowledge of the terms of such receipt or of any claim of right on the carrier's part to limit his liability. *The American Express Co. v. Spellman*, 90 Ill. 195.

The assent of a shipper to the conditions of a bill of lading limiting the carrier's liability, will not be inferred from the mere acceptance of the bill by him without objection, nor from the fact of his having formerly received similar bills. Both these facts are evidence of such assent, however, and may go to the jury. *Brie and West Trans. Co. v. Dater*, 91 Ill. 195.

Where a carrier seeks to limit his liability by special contract he is bound by the law of the State where the contract was made. *Michigan Central R. Co. v. Boyd*, 91 Ill. 268.

In Massachusetts in order to render a clause in the bill of lading limiting the liability of the carrier effectual for that purpose, the bill must be taken by the consignor without dissent at the time of the delivery of the property for transportation. If such bill be given a few days after, and be dissented from by the consignee or owner, the carrier is not protected. *Id.*

The fact that the owner of goods by himself or his clerk filled up a railway receipt for goods shipped, which receipt contains a clause limiting the carrier's liability, is evidence to go to a jury of an assent by such owner to the stipulations of the receipt. It is not, however, conclusive in that respect. *Bescowitz v. Adams Express Co.*, 98 Ill. 528.

Where such receipt was the receipt of another company, *held*, that it was inoperative even for the purpose above designated. *Id.*

A carrier gave a receipt for three bales of furs containing a clause exempting him from liability for any loss or damage "of any box, package or thing" for over \$50. The furs being lost, *held*, that the consignor could recover \$50 for each bale. *Id.*

Where an express company enters into a contract for carriage, whereby it exempts itself from liability for loss, it will nevertheless be responsible for the negligence of a railroad company to whom it commits the goods. *Id.*

Massachusetts.—A clause in a bill of lading, "specie, bank bills and other articles of great intrinsic or representative value will only be taken upon a representation of their value, and by a special agreement," was held not to apply to a family portrait enclosed in a wooden case. *Green v. Boston and Lowell R. Co.*, 128 Mass. 231.

See *Michigan Central R. Co. v. Boyd*, 91 Ill. 268.

Minnesota.—A common carrier cannot by special contract limit his liability to cases of injuries caused by gross negligence. He will in any event be liable for his own negligence and that of his servants. *Shriver v. Sioux City and St. Paul R. Co.*, 24 Minn. 506.

Where there is a contract limiting the liability of a common carrier of goods and a loss occurs, the burden is on the carrier to show from what cause the loss occurred. *Id.*

Mississippi.—A railroad company acting as a carrier cannot by special contract exempt itself from liability for a loss occasioned by a failure to provide the safest and most approved engines and other rolling stock. *New Orleans, etc., R. Co. v. Faler & Co.*, 58 Miss. 911 S. C. *supra*.

A. shipped certain cotton on a railway, receiving a bill of lading marked "not responsible for loss or damage by fire or water." The cotton was, contrary to A.'s protest, placed on flat cars, and while in transit was ignited and burned by sparks from the engine, which had a defective spark arrestor; *held*, that the carrier was liable for the loss. *Id.*

New York.—A. shipped on a steamship certain gold coin, receiving a receipt which exempted the steamship company from liability for loss by "theft on land or afloat," and "by barratry of master or mariners." The

gold was stolen en route by the purser. *Held*, that the carrier was exempt from liability. *Spineiti v. Atlas Steamship Co.*, 80 N. Y. 71.

Where a carrier enters into a contract for the transportation of goods beyond its own line, and inserts into the contract a clause limiting the liability of itself and its connections, said clause will enure to the benefit of all the carriers in the line of transit. *Whitworth et al. v. Erie Ry. Co.*, 45 N. Y. Superior Ct. 602 S. C.; 87 N. Y. 418; 6 Am. and E. R. Cas. 349.

Where the contract of carriage provided that the carrier should be exempt from liability for all loss or damage to the goods by fire while in transit, or while in deposit or at depots, and the evidence showed that said goods had been destroyed while stored in a wooden freight depot by a fire, the origin of which was unknown, communicated from the passenger depot, which lay on the other side of an eighty-foot slip; *held*, that the burden of proof was on the plaintiff to show negligence on the part of the carrier, and that the evidence failed to show such negligence. *Id.*

However broad and general the language of a carrier's contract may be, if it does not specifically and in express terms release him from the consequences of his own negligence, and if the general words may operate without including such negligence, that interpretation will be given to them. *Holsapple v. Rome, W. and O. R. Co.*, 86 N. Y. 275; 3 Am. and Eng. R. Cas. 487.

A bill of lading for live stock contained a clause providing that in consideration of the reduced freight the carrier should be exempt from liability for loss "caused by burning of hay, straw or other material used for feeding said animals or otherwise." While in transit a fire occurred through the negligent failure of the company to provide a proper spark arrester, and several cattle were killed. *Held*, that the carrier was liable for the loss. *Id.* See also *Bills v. N. Y. Central R. Co.*, 84 N. Y. 5; 3 Am. and Eng. R. Cas. 818; *N. Y. Cent. and Hudson River R. Co. v. Standard Oil Co.*, 87 N. Y. 498.

Tennessee.—A carrier may by special contract limit his liability, but cannot exempt himself from responsibility for the negligence of himself and his servants. *Dillard Bros. v. Louisville and Nashville R. Co.*, 2 Lea (Tenn.) 288.

The acceptance by the shipper on the day of shipment of a bill of lading for his goods containing valid stipulations against liability for loss and the retention of the same by him without objection, raises a presumption, in the absence of evidence to the contrary, that the shipper knew the contents of the receipt and assented to its terms. *Id.*

A railroad company receiving goods for shipment beyond the terminus of its line may, by special contract, protect itself from liability for loss occurring on its line. And such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. *E. Y. Va. and Ga. R. R. Co. v. Brumley*, 5 Lea (Tenn.) 401.

Vermont.—A railway receipt for goods contained a clause limiting the liability of the company to its own line. The consignor could not read. The carrier's clerk read him the receipt, omitting said clause. *Held*, that as the clause was merely expressive of the common law, no fraud had been practised on the consigner. *Hadd v. United States and C. Ex. Co.*, 52 Vt. 335.

West Virginia.—A common carrier cannot exempt himself from liability for loss or damage in any degree caused by the negligence or misfeasance of himself or his servants. *Brown v. Adams Express Co.*, 15 W. Va. 812.

Where goods are committed to a carrier without an express contract limiting liability, the mere fact that the consignor had previously seen bills of lading issued by said carrier containing clauses limiting liability does not

afford the carrier any ground for setting up that the particular contract in question was made on such terms. *Id.*

Dubitatur.—Whether the acceptance of a bill of lading containing such clauses would of itself be enough to exempt the carrier. *Id.*

English Cases.—Certain cattle were forwarded upon a railway, the freight being prepaid. The bill of lading provided that they were to be “at the owner’s own risk.” Through the negligence of the carrier’s servants the fact that the freight had been prepaid was not known at the point of destination. The cattle were accordingly detained there some time and injured in consequence. *Held*, that the clauses of the bill of lading had no application, and that the carrier was liable. *Gordon v. Great Western R. Co.*, 45 L. T. R. (N. S.) 509; 3 Am. and Eng. R. Cas. 619.

Where a carrier, in consideration of a reduced rate of freight, entered into a special contract stipulating for a limitation of liability, and a “risk note” to that effect was signed by the shipper, it was held that the contract was reasonable and binding; it appearing that the carrier was also accustomed to carry goods without any limitation, and that the shipper knew that fact when he signed the “risk note.” *Brown v. Manchester, S. and L. R. Co.*, 46 L. T. Rep. (N. S.) 389. See also *Doolan v. Midland R. Co.*, L. R. 18, 10 C. L. 47; *Moore v. Midland R. Co.*, I. R., 8 C. L. 234; 9 C. L. 20.

CHICAGO AND NORTHWESTERN RY. Co.

v.

ROBERT E. JENKINS.

(*Advance Sheet*, 108 *Illinois*, 588. May 12, 1882. *Rehearing denied September Term*, 1882.)

A plea of the bankruptcy of the plaintiff and the transfer of his property and rights to an assignee after the commencement of the suit, in abatement of the action, without any prayer of any kind, is subject to demurrer.

Under section 5047 of the Revised Statutes of the United States, the assignee, at any time after his appointment, has the right to be substituted as plaintiff, on his request, in an action pending in the name of the bankrupt for the recovery of a debt or other thing, which might or ought to pass to the assignee, who may thereafter prosecute the suit the same as if originally brought in his name, and such substitution will furnish a good replication to a plea in abatement of the plaintiff’s bankruptcy.

The bringing of a suit is the issuing of a summons or other process to bring the defendant into court. The substitution of the assignee of a bankrupt as plaintiff in a suit is not to be regarded as the commencement of the suit by the assignee, within the meaning of the United States statute limiting such actions to two years after the assignee’s appointment.

The statute of the United States limiting the bringing of suits by the assignee of a bankrupt within two years from the time of his appointment, was designed only to apply to suits brought by him, and not to actions already pending, in which he may be substituted as plaintiff, although such substitution may be more than two years after his appointment.

In construing statutes of limitations, the courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. Cases or classes not enumerated are excluded from their operation by implication.

The Statute of Limitations does not run against a cause of action after a suit thereon is commenced, and during its pendency, and numerous cases hold that the mere commencement of a suit without service within the statutory period will prevent the statute from becoming a bar.

Where not only new parties are made in a pending suit, but by amendment also new rights or causes of action already barred are brought before the court, the Statute of Limitations may be properly set up as to such new matter, but not when no new rights are brought into the suit which were not barred when the suit was brought.

All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the railway company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee.

The law will never indulge in the presumption of assent to rules of a railway company for a lien for damages caused by delay in receiving the goods shipped, from the publication of the same.

The right to demurrage does not attach to carriers by railroads. If it exists at all as a legal right, it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook county; the Hon. Rollin S. Williamson, Judge, presiding.

Mr. A. M. Herrington, for the appellant.

Under the Bankrupt Law the action in favor of the assignee was barred after the lapse of two years. *Gifford v. Holmes*, 98 U. S. 152; *Bailey v. Glover*, 21 Wall. 346; *Moore v. State Ins. Co.*, 2 Tenn. Ch. Rep. 380.

If the assignee is not made a party to a pending action until more than two years after his appointment, his claim will be barred, for the amendment by which he is made a party will not relate back, and thereby make him a party ab initio, and thereby defeat the limitation. *Cogdell v. Exume*, 10 N. B. 327; S. C. 69; N. C. 464.

The rule, without an exception, is, that all causes of action are vested in the assignee upon the execution of the assignment, and the limitation begins to run from that time, and this applies equally to courts of equity and courts of law. *Bailey v. Wier*, 21 Wall. 342.

And the limitation applies to the State court as well as to the Federal courts. *Comegg v. McCord*, 11 Ala. 982; *Archer v. Duvall*, 1 Fla. 219.

This court has held that when a new party is brought into the suit against whom the Statute of Limitations has run, it may be pleaded, and the fact that the suit was pending does not stop the statute. *Clark v. Manning*, 95 Ill. 581; *Crowl v. Nagle*, 86 Ill. 440.

The bankruptcy of a plaintiff after suit brought may be pleaded, and thereby defeat the action, and the assignee will be compelled to proceed de novo. 1 Chitty's Pleading (16th Am. ed.), 27; Kinnear *v.* Tarrant, 15 East, 630; Biggs et al. *v.* Cox, 4 Barn. & Cres. 921; Eyester *v.* Goff et al., 92 U. S. 524.

Where a party to an action has received his discharge in bankruptcy pending the action, he has no further interest in the suit. Knox *v.* Exchange Bank, 12 Wall. 379; Herranden *v.* Howard, 9 id. 685.

In trover a lien must be specially pleaded, and cannot be given in evidence under the general issue, and hence the pleas were proper, and were not subject to the objection that they amounted to the general issue. 1 Chitty's Pleading (16th Am. ed), 580; Hahn *v.* Ritter, 12 Ill. 80.

Messrs. Sleeper & Whiton for the appellee.

This action was pending in the name of Noyes & Messenger at the time the proceedings were had in bankruptcy, and Jenkins was admitted to prosecute the same in his own name. Revised Statutes of the United States, sec. 5047.

The provisions of sec. 5057, United States Statutes, only limit the maintenance of actions which are commenced by or against an assignee, and do not purport to interfere with the prosecution of actions pending in the name of the bankrupt at the time when the bankruptcy proceedings are commenced. Kane *v.* Pilcher, 7 B. Mon. 651; Judson *v.* Lathrop, 6 La. Ann. 587; Lotting *v.* Fassman, 17 N. B. 183; Walker *v.* Towner, id. 285; Steele *v.* Moody, id. 558; Wilt *v.* Stockton, 15 id. 23; Norton *v.* Villebeuve, 13 id. 304; Holbrook *v.* Brenner, 31 Ill. 501; Stevens *v.* Hauser, 39 N. Y. 302; In re Masterton, 4 N. B. 180; Sedgwick *v.* Casey, id. 161; Dubois *v.* Anderson, 6 id. 145.

Admitting the assignee to prosecute the suit was only continuing the same, and was not the commencement of a new suit, and is analogous to continuing a suit by an executor after the plaintiff's death. Kane *v.* Pilcher, 7 B. Mon. 651; Morris et al. *v.* Swartz, 10 N. B. 305; Mirus et al. *v.* Swartz, 37 Texas, 13.

The special pleas were bad on special demurrer, as amounting to the general issue. Knobel *v.* Kucher, 33 Ill. 308; Illinois Central R. R. Co. *v.* Johnson, 34 id. 389; Johnston *v.* University, 35 id. 518; Kennedy *v.* Strong, 10 Johns. 289; Cullett *v.* Flinn, 5 Cow. 466; Hunt *v.* Cook, 19 Wis. 463.

The third plea professes to set up a lien on the paper for demurrage, and seeks to justify the conversion by reason of that lien, but in fact shows none. The rule recited does not pretend to create or impose any lien, and no agreement for any lien is stated. The law does not impose a lien as it does for freight. 2 Redfield on Railroads, title "Demurrage," 191; Crommellin *v.* New York and Harlem R. R. Co., 10 Bosw. 77; 4 Keyes, 90.

WALKER, J.—It appears that Noyes & Messenger, a business firm in Chicago, had consigned to them a quantity of paper, from Clinton, Iowa, by the road of appellant. It arrived at its depot in Chicago on the 4th of July, 1872. The consignees were afterwards notified of its arrival. On the 11th of that month they paid the freight and removed one dray load, but the company refused to deliver the balance of the paper until the consignees should pay five dollars a day for each day it remained on the track after twenty-four hours from the time of its arrival, which was claimed for demurrage. This the consignees refused to pay, and after a demand and refusal, brought trover to recover damages for its conversion. The defendant pleaded the general issue.

The case remained on the docket in this condition until in April, 1874, when Noyes & Messenger were declared bankrupts by the United States District Court, and appellee was appointed assignee of their estate, and the requisite assignment was made to him. No further action was taken in the case until on the 12th day of April, 1878, when, with the leave of the court, the company filed a plea that the plaintiffs had been adjudged bankrupts. Jenkins thereupon filed his petition for leave to be substituted as a party plaintiff, and to be permitted to prosecute the suit, and the substitution was made, and the leave granted by the court.

Afterwards the company filed four pleas in bar of the action. The first, the general issue; second, the Statute of Limitations of two years; third, a plea that the defendant had the right to retain the property to secure its lien for demurrage; and fourth, the paper was delivered to defendant, to be held until plaintiffs should pay all moneys due or to become due on account of the transportation of the paper, and to pay all charges to become due for demurrage, unloading, or warehousing the same. Appellee took issue on the first, and replied to the plea of the Statute of Limitations that the cause of action had accrued to Noyes & Messenger within two years of the commencement of the suit; that plaintiff had been substituted since the original plaintiffs had been declared bankrupts. To the third and fourth pleas he demurred specially that they severally amounted to the general issue. Afterwards, defendant filed a plea of the Statute of Limitations of five years, which was traversed. Subsequently the demurrer was heard to the replication to defendant's second plea, and it was carried back and sustained to that plea. The parties waived a jury, and by consent submitted the case to the court for trial, on an agreed statement of facts, and the court found the issues for plaintiff, and assessed his damages and rendered judgment for \$1370.45. Defendant appealed to the Appellate Court for the First District where the judgment was affirmed, and the case is brought to this court by appeal.

It is urged that the court erred in sustaining the demurrer to

the plea averring that Noyes & Messenger had become bankrupts; that Jenkins had been appointed their assignee, and all of their property and rights were assigned to and became invested in him, and he became thereby entitled to the cause of action. This plea has no prayer of any kind, but is in the nature of, or was intended no doubt as, a plea in abatement. All pleas of that character must conclude with a prayer that the suit abate. It was for that reason subject to a demurrer. Again, if it could be held that the suit could be abated for the want of a proper party plaintiff, under the provision in the 5047th section of the United States Revised Statutes, appellee was substituted as plaintiff. That provision is this: "If at the time of the commencement of the proceeding in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be substituted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him." This is clear and emphatic that he shall be thus substituted. Nor does it fix or limit any time within which the substitution shall be made. The statute says it shall be done if the assignee shall require it. This substitution, then, was a sufficient replication to the plea, had it been good. It supplied the necessary and proper party plaintiff, and authorized him to prosecute the suit with like effect as had he been the original plaintiff in the case.

It is insisted that the court erred in sustaining the plea of limitations of the Bankrupt act. The 5057th section of the United States Statutes provides: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when the assignee is appointed." Appellant contends, that inasmuch as more than two years expired after appellee was appointed assignee, and his substitution as plaintiff, the bar of this section became complete,—that the statute began to run as soon as he was appointed,—that an action accrued to him at that time, and that his substitution was the commencement of the suit by him. If this be the true construction of the statute, then the court erred in sustaining the demurrer to the plea. The fallacy of the argument consists in calling appellee's substitution as plaintiff the bringing of a suit. The bringing of a suit is the issuing of a summons or other process, to bring the defendant into court. This is one of the most familiar, best settled and recognized rules of the

law. See Stephen's Pleading, page 5 (2d ed.); 3 Blackstone's Commentaries, 273; 1 Chitty's Pleading, page 107.

It then follows that this suit was brought by Noyes & Messenger, and not by appellee. Instead, then, of this suit being brought more than two years after appellee's appointment, it was brought before, and was pending at the time, and so continued until his substitution as plaintiff. Had no objection been made by plea by appellant, the suit could have progressed to its final termination in the name of Noyes & Messenger. This was fully recognized by appellant in filing the plea that they had ceased to have any interest in the cause of action.

In the common acceptance of the term the suit was not brought by appellee by being substituted as plaintiff. All persons would understand it was a misuse, if not a perversion, to so use the term, and we must presume Congress used the term in its ordinary and general sense, unless repelled by the context. A careful consideration of the entire section, we think, does not show that it was intended in a different sense. The 5047th section gave the assignee the right, without limitation or any restriction, to be substituted. Nor is there any limitation or proviso that he shall be thus substituted within two years of his appointment. If such had been the purpose it could have been easily expressed, and the natural inference is that it would have been so expressed. The terms of the statute relate alone to the bringing of the suit within the statutory period, and the courts have no power to add to or bring cases under its provisions not provided for in terms or by necessary implication. In construing statutes courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. To go beyond that is judicial legislation. This case is not named, nor is it embraced in a class. It is excluded by implication from actions brought after appellee's substitution as plaintiff. It clearly is not embraced in that class, and by the previous section he had the right to be substituted without limitation, terms or conditions. We are clearly of opinion, from the language of these two sections, that there was no bar of the action. While statutes of limitation under modern rules must be fairly and reasonably construed to effectuate the intention of the legislature, like other enactments, the courts are prohibited from straining construction to embrace cases not within the language or meaning of the enactment. The ancient rule was to construe them strictly, so as to exclude all cases not expressly named in the statute, but the rule has been modified by the more modern decisions.

It is, however, urged that other courts have given the section a different construction, and the case of *Binley v. Glover*, 21 Wall. 342, is referred to as being in point. If this is true, it is conclusive, as that court has the constitutional right to give authori-

tative construction to all acts of Congress, and so given, all other tribunals must conform to it. But does it decide this question? That case was where the assignee brought suit, more than three years after his appointment, for the recovery of property rights transferred from the bankrupt to him by the assignment. That was a suit brought by him, and is within the very terms of the statute, and the decision could not be otherwise than the action was barred. The surprise is that it was so far doubted as to have been contested. But this is wholly a different question from that. This is debatable, but that was too clear for dispute. In that case the court say, in considering this section, that "it is precisely like all other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property, or rights of property, of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time the cause of action accrued for or against the assignee. Such is almost the language in which the provision is expressed in the section." This is not in point, because this question was not before the court. But stress is laid on the language, "and applies to all judicial contests between the assignee and other persons." And because this was a contest between appellee and appellant, this language requires the bar to be applied. How does it apply to all judicial contests? Why, as the court, in the same sentence, said, like all other statutes of limitation. This is the manifest and only reasonable meaning of the language. We must consider it in its connection, and not as a separate and distinct clause, giving a definition.

If like all other statutes of limitation, then who ever heard of the statute running while an action to recover the matter in dispute was pending? Such a claim, we apprehend, was never made in a court. On the other hand, the books are full of cases holding the mere commencement of a suit, without service within the statutory period, will prevent it from becoming a bar. This action, we have seen, was clearly pending, and if, as that court says, this section is precisely like all other statutes of limitation, how is it possible to hold the statute could run and bar the action, when it was all of the time pending? Would any person contend that were the assignee to begin an action just before the close of two years after his appointment, and it were to be undecided for more than two years from its commencement, the defendant might plead this two years' statute and bar a recovery? Surely not. And why? Because the suit was not barred when the action was brought, and after it was commenced the statute could not run while the suit was pending. This is the construction given by all courts to all statutes of limitation. There is the same reason for applying the statute to the case at bar.

The statute gives the right to the assignee to be substituted in

the place of the bankrupt plaintiff, and to prosecute the suit in his own name, "in like manner, and with like effect, as if it had been originally commenced by him." Was it ever supposed that under any other statute of limitations, where an executor, administrator or other person was substituted in the stead of the plaintiff who brought the suit, the defendant might plead the statute, and bar a recovery? Surely not. And the Federal Supreme Court says this Limitation law is precisely the same in its application as all others. If it be said that in such cases the suit abated by the death of the plaintiff, at common law, and in such cases the statute authorizes it to be revived and continued in the name of the representative, and its revival was the commencement of a new suit—if this be true, still the suit was never abated. It was still pending, and the act authorized the assignee to continue its prosecution. Had the suit abated by the bankruptcy of the plaintiffs, there would be more seeming plausibility for saying that the substitution of appellee was the commencement of a new suit by him, and for claiming the plea could have been interposed. But that is not the fact in this case. Nor does the case of *Gifford v. Holmes*, 98 U. S. 248, announce a different rule. The other cases referred to in the lower Federal courts, if they announce a different rule, are not binding on us, further than supported by reasoning to convince our judgment. We think that the canons of construction not only support, but require, the conclusion announced by us. In these views we are supported by the case of *Kane v. Pilcher*, 7 B. Mon. 651. In that case this precise question was presented, and the court held the statute did not apply. And the case of *Herndon v. Howard*, 9 Wall. 664, seems in principle to support this doctrine, if it needs support.

The cases of *Clark v. Manning*, 95 Ill. 581, and *Crowl v. Nagle*, 86 id. 437, are claimed to have a bearing on this question. These cases have no application, because there were not only new parties made, but rights already barred before they were brought into court for the first time were brought before the court. Here no new rights were brought into the contest. Had appellee amended the declaration so as to embrace a new cause of action not before the court, these cases would then be applicable. But that was not done in this case, but it remained precisely the same, as to the matter in litigation, after as before the substitution of appellee as plaintiff.

It is claimed that appellant had the right to hold the property until its charges for demurrage were paid—that they were a lien on the property, and it was not required to make delivery until they were paid. The claim is based on rules and regulations adopted and published by the company. It will be conceded that all liens are created by law, or by contract of the parties. Where the law gives no lien, neither party can create it without the con-

sent or agreement of the other. Noyes & Messenger were therefore not bound by these rules unless they assented to them when the contract for shipping the goods was entered into by the parties, and such a contract is not claimed. But it is insisted that as the rules were public, and generally understood, it must be presumed they assented. For the purpose of creating such a lien on property the law will never indulge such presumptions. There is no evidence or agreement that either the consignor or consignee ever had notice, or knew of such regulations. But even if they had, unless they agreed to be bound by them the rule could create no such lien.

We held in the case of *Illinois Central R. R. Co. v. Alexander*, 20 Ill. 23, that railroad companies, when they had carried goods to their destination, if not removed by the consignee, might store them in their warehouses, and thus terminate their liability as common carriers, and thereby assume the relation and liabilities of warehousemen. To the same effect is the case of *Richards v. Michigan Southern and Northern Indiana R. R. Co.* id. 404; and in the case of *Porter v. Chicago and Rock Island R. R. Co.* id. 407, it was held it was their duty to do so, or remain liable for loss as common carriers. It was held in the former of these cases, that when stored, and they had placed the goods in their warehouse, they were entitled to charge the customary price for such services, and on such charges being paid or tendered, and a refusal by the company to deliver on demand, it became liable for a conversion.

The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Where an assignee in bankruptcy of a party to a suit is substituted for the original party, the suit will be held to be begun with the issuing of the summons as if no substitution had taken place, and the statute of limitations will not run during the pendency of such suit.

By the maritime law the master has a lien on the cargo for demurrage, and

such a lien may be enforced in the admiralty, even though demurrage was not expressly stipulated for in the bill of lading. *The Hyperion's* cargo, 9 Low, 98; *Donaldson v. McDowell*, 1 Holmes, 290.

Inconvenience to a railroad company from having goods left in the freight cars standing in the public highway during the unreasonable delay of the consignee to remove the goods, constitutes only a claim in the nature of demurrage, and the company have no lien on the goods for the payment thereof. *Crommelein v. N. Y. and Harlem R. R. Co.*, 1 Abb. (N. Y.) App. Dec. 472.

To entitle a carrier who has contracted to transport goods, and to deliver them to the consignee, to freight, a complete delivery must be made.

So where the carrier, after a delivery of a portion of the goods, stores the residue, he cannot recover freight upon the portion delivered. *Western Transp. Co. v. Hoyt*, 69 N. Y. 230.

If the consignee as such had nothing to do with the shipment, there would be no privity of contract between him and the shipowner, and before acceptance of the cargo the law would imply no contract on his part to pay demurrage. *Falkenburg v. Clark*, 11 R. I. 278.

The extraordinary liability of a R. R. Co. as carrier of goods extends until the consignee has a reasonable time to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business. *Leavenworth, L. and G. R. R. Co. v. Moris*, 16 Kan. 333; *Pinney v. First Div. St. Paul and Pacific R. R. Co.*, 19 Minn. 251; *The Mary Washington*, 1 Abb. U. S. 1; *Solomon v. Philadelphia Steamboat, etc., Co.*, 2 Daly (N. Y.), 104; *Lamb v. Camden, etc., R. R. Co.*, id. 454; *Sheuk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109; *Winslow v. Vermont, etc., R. R. Co.*, 42 Vt. 700; *Chicago, etc., R. R. Co. v. Bensley*, 69 Ill. 680.

If the goods are not taken in a reasonable time the carrier may store them at the expense of the consignee. *Hurd v. Hartford, etc., R. R. Co.*, 40 Conn. 49; *Hirsch v. The Quaker City*, 2 Disney (Ohio), 144.

If the common law liability of the carrier is restricted, knowledge and assent of the shipper must be shown. *Gaines v. Union Transp., etc., Co.*, 38 Ohio St. 418; *Field v. Chicago, etc., R. R. Co.*, 71 Ill. 458; *Adams Express Co. v. Haynes*, 43 Ill. 89; *Illinois Central R. R. Co. v. Frankenberg et al.*, 54 Ill. 88; *Tyler Ullman & Co. v. Western U. Tel. Co.*, 60 Ill. 421; *Burlington, etc., R. R. Co. v. Rose*, 1 A. and E. R. R. Cas. 258.

Regulations made by the carrier must be brought to the actual knowledge of the shipper or passenger before he is bound by them. *Gott v. Dinamore*, 111 Mass. 52; *Union, etc., Co. v. Erie R. R. Co.*, 87 N. J. L. 28; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *Mobila, etc., R. R. Co. v. Wainer*, 49 Miss. 725; *The Pacific, Deady 17*, *Maroney v. Old Colony, etc., R. R. Co.*, 106 Mass. 153; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Southern Ex. Co. v. Crook*, 44 Ala. 468; *Hopkins v. Westcott*, 6 Blatchf. 64.

HOUSTON AND TEXAS CENTRAL R. R. CO.

v.

RUST & DINKINS,

(*Advance Case, Texas, 1882.*)

Railroad companies are not forbidden by the common law or by the constitution and statutes of the State of Texas to make a discrimination in their rates of freight. They are only forbidden to make an unjust discrimination.

Whether in any particular case the discrimination has been unjust, is a question for the jury.

APPEAL from Travis Co.

Opinion of Judge Walker adopted.

The charge of the court asserts the proposition that it is unlawful for a railroad company to discriminate in the rates charged on freight between shippers over its road where the transportation involves the like service to the one as to the other, and where the said shippers are sending their freights over the road during the same period of time. It likewise propounded the test whereby to ascertain and determine in what consisted the "discrimination," which was defined, in effect, to consist of the single fact, without other qualification or exception, of charging a greater rate to the one person than to the other or others. Equality and sameness of charge for transportation to all alike is held in the charge to be a legal obligation on the part of the railroad company, and deviation from that test to be a violation of it, and further, that the difference between the amounts so charged to the parties respectively furnishes the measure of damages to the party who has paid the higher price.

At the date of the transaction which originated this suit, no legislation had been had which affected or modified the common-law rules applicable to the rights of a common carrier in respect to making contracts establishing rates of freight with its customers and patrons. The leading American decisions which have in recent times passed upon the obligations of railway companies towards the public in their relation of common carriers have been uniform, we think, in maintaining on principles of the common law, irrespective of statutes, that their duty lies in the strictest impartiality in the conduct of their business, and in withholding all privileges or preferences from one customer which are not extended to all. (See Hutchinson on Carriers, §§ 297-301, inclusive, and the cases there cited and discussed, and other authorities cited.) Peirce, in his treatise on the law of railroads, p. 498, deduces from the cases decided the following propositions: "A railroad company, being under a public obligation as a common carrier, and being in

a certain sense a public agent, in consequence of holding by delegation the power of eminent domain, is required to treat the public with equality and fairness. It cannot discriminate in the transportation of persons and merchandise by giving special privileges to one which it denies to another (citing *Sanford v. Catawissa, W. & E. R. R. Co.*, 24 Pa. St. 378; *Audenried v. Philadelphia & Reading R. R. Co.*, 68 Pa. St. 370; *New England Express Co. v. Maine Central R. R. Co.*, 57 Maine, 188; *McDuffie v. Portland & R. R. Co.*, 52 N. H. 430; *Chicago & N. W. R. R. Co. v. People*, 56 Ill. 365), or by charging for the same service higher rates to some than to others (citing *Messenger v. Penn. R. R. Co.* 7 Vroom, 407; *Cumberland Valley R. R. Co.'s Appeal*, 62 Penn. St. 218, 230; *Cambias v. Philadelphia & Reading R. R. Co.*, 4 Brewster, 563, 622; *Vincent & Chicago v. A. R. R. Co.*, 49 Ill. 33). This rule is not to be inexorably applied, so as (provided the rate is reasonable for all) to exclude contracts for transportation at a less rate in special cases, where, under the circumstances, the discrimination appears reasonable" (citing *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. R. Co.*, 115 Mass. 416, 422; *McDuffie v. Portland & R. R. R. Co.*, 52 N. H. 430, 451, 452; *Eclipse Tow Boat Co. v. Pontchartrain R. R. Co.*, 24 La. An. 1).

Hutchinson, in his work on Carriers, § 302, in a note, shows that there is a difference of opinion upon the question whether by common law the common carrier was bound to charge the same rate for the same service to all parties, and he quotes from Byles, J., as follows: "I know of no common law reason why a carrier may not charge less than what is reasonable to one person, or even carrying for him free of all charge." The question was considered in the *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393. The court said: "The principle derived from that service (the common law) is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public, and to every individual, consists in the restricted right to charge, in each particular case of service, a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint." The author, in the discussion contained in the note, shows the construction which English courts have placed upon the English railway and canal traffic act of 1854, in regard to preferences in the rates charged for carrying. That act has been interpreted to apply to preferences of that character, and construed not to prohibit just and reasonable discriminations; in that respect certainly the rule of the common law is not more stringent against carriers than the act itself, which was passed in order to limit and restrict them in their dealings with the public. In this connection we will quote some of the comments of the author made in the note: "Although the purpose of the act is to

prevent, among other things, unreasonable discrimination in rates, to the prejudice or disadvantage of particular individuals, it was not, it has been said, to relieve every person from all possible prejudice or disadvantage from any arrangement which might be made by the carrier, if the arrangement was for the benefit of the public at large, for the reasonable increase of the business and profits of the carrier, and was not entered into with a view to the advantage or preference of one party or disadvantage of the other.

So the courts will not interfere if the change or arrangement will greatly promote the interest of the carrier without unreasonably prejudicing those who may desire to employ him, or will be beneficial to the community, though disadvantageous to particular individuals. . . . But though the court, when such a question is brought before it under the statute, it is said, will feel great reluctance in interfering with the carrier in the management of his own business, and his interest must be taken into the account, yet if the discrimination made by him subjects others to unreasonable disadvantages, it will interfere and enjoin the carrier from making such preferences. And so it will if the object of the carrier is, not solely his own advantage, but also to give a preference to one individual to the disadvantage of another, or to one locality to the prejudice of another." The author appends to this note a reference to several English reported cases.

The rule applicable to the subject of discrimination or preferences given by railroad companies, as to freight rates, as it is summarized by Mr. Pierce, quoted above, seems, on reason and authority, to be a just and correct statement of it, as it ought to be construed and held to apply under the principles of the common law. Our constitution, adopted April 18, 1876, contains the following action under article 10: "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

The legislature, in 1879, passed a law on the subject contemplated by the foregoing provision of the constitution, but, being enacted after the plaintiff's cause of complaint occurred, does not require from us any discussion concerning it.

The section of the act referred to, Art. 4257, Rev. Stat., provides, among other things, as follows: "And no unjust discrimination in the rates or charges for the transportation of any freight shall be made against any person or place on any railroad in this

State; and it shall be prima facie evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm or company, a greater compensation than from another for the transportation, in this State, of any freight of the same kind or class, in equal or greater quantities, for the same or a less distance, which prima facie evidence may be rebutted by competent testimony on the part of such company, showing that the discrimination, if any, was not an unjust one. And the question upon an issue as to whether any alleged discrimination is unjust or not, shall be a question of fact to be tried and determined as any other issue of fact in a case."

The organic law, together with the legislation had upon the subject, though not affecting the rights of the parties, by reason of their operation upon them, are here quoted and referred to, to show, in this connection, that the constitutional direction given to the law department of government, as well as the legislative mind, both coincide in defining the meaning of the term "discrimination," and in the meaning contemplated in the prohibition against "discrimination," with the general qualifications on the subject which we have pointed out, as existing under decisions in America and in England. It is not "mere" discrimination that is rendered obnoxious and unlawful, but it is "unjust" discrimination. As to what shall constitute improper discrimination, is not defined, nor attempted to be defined; it is a question of law and fact in the given case, and whether the discrimination be or not unlawful, must be ascertained by applying to the facts of the case the principles of the common law to the general policy of our statutory law governing carriers and railroads.

The test of liability, submitted by the charge, was confined to the single question of irregularity in the rate of freight charged to the plaintiffs, as compared with the rate charged to certain other specified persons, irrespective of any or all of the other facts of the case. In that the court erred. It ought to have been submitted to the jury to determine whether, under all the facts of the case, the defendant charged the plaintiffs a rate beyond what was reasonable, and beyond the price which was exacted of the public, generally, at the times when the plaintiffs shipped their cotton on defendant's railroad. And if, although the plaintiffs were not required to pay a higher rate than were the public generally, yet if the defendant had allowed to certain particular persons or merchants in a certain particular locality, more advantageous terms than had been given to the public generally, or to the plaintiffs, it ought to have been submitted as an issue of fact for the jury to determine whether, under appropriate instructions applicable to the subject, under all the evidence applicable to the question, such preference so given was a fair and legitimate one, one justified by the common law rule forbidding the carrier to give to one

special privileges which it denies to another, but which, at the same time, does not exclude, as forbidden, contracts for transportation at a less rate, in special cases, where, under the circumstances, the discrimination appears reasonable.

It does not become necessary to pass upon the correctness or not of the counter-charges asked by the defendant and refused; it is sufficient that the charge of the court was erroneous, and was calculated to mislead the jury under a wrong test of defendant's liability. On another trial a charge properly applicable to the whole case can be given by the court under the law governing the case, and we deem it superfluous to pursue the investigation of this record any further.

We conclude the judgment ought to be reversed, and the cause remanded.

(See note, 5 Am. and Eng. R. R. Cas. 845).

JULIET TAYLOR

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. R. Co.

(45 Michigan Reports. Jan. 5, 1881.)

An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises.

Breaches of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; though when the duty imposed is for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution.

When a municipal charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for the default in neglecting to observe such regulations, no action against a lot owner can arise, if at all, until after the city has been held liable in a suit against it.

Error to the Superior Court of Detroit. Submitted October 15, 1880. Decided January 5, 1881.

Case. Plaintiff brings error. Affirmed.

Griffin & Dickinson and Henry M. Campbell for plaintiff in error. The breach of a duty imposed by statute for the benefit of individuals will sustain a remedy at common law if an individual is thereby injured: *Couch v. Steel*, 3 El. & Bl. 402; *Chicago & Alton R. R. v. Engle*, 76 Ill. 817; *Correll v. B. C. Railroad*, 38 Iowa, 180; *Jetter v. N. Y. G. & H. R. R. R.*, 2 Keyes, 154; *Willy*

v. Mulledy, 78 N. Y. 310; *Dudley v. Mayhew*, 3 N. Y. 15; *Angusta, etc., R. R. v. McElmurry*, 24 Ga. 75; *Wakefield v. Conn., etc., R. R.*, 37 Vt. 330; 1 Addison on Torts, § 59; where an action lies against a city for an injury caused by neglect to observe an ordinance and the city can recover from the individual from whose default the injury arose, the person injured may bring suit against the individual in the first instance. *Lowell v. Spaulding*, 4 Cush. 277; *Payne v. Rogers*, 2 H. Bl. 350; *Boston v. Worthington*, 10 Gray, 496; *Kirby v. Boylston Market Association*, 14 Gray, 249; *Milford v. Holbrook*, 9 Allen, 18.

Ashley Pond, for defendant in error, cited against the right of action *Flynn v. Canton Co.*, 40 Md. 312; *VanDyke v. Cincinnati*, 1 Disney, 532; *Heeney v. Sprague*, 11 R. I. 456; *Keokuk v. Independent District*, 52 Iowa (5 N. W. Rep. 559).

COOLEY, J.—The plaintiff sues the railroad company to recover compensation for an injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of premises occupied by defendant in the city of Monroe, and which the defendant had failed to remove as required by law. It is not claimed that any such action would lie at the common law, and the right of recovery is supposed to arise from certain state and municipal legislation.

The state legislation in question is the general act for the incorporation of cities, passed in 1873, under which the city of Monroe is now organized. Chapter XXIII. of this act relates to the sidewalks. Section one gives the city council control of all sidewalks, with power to construct and maintain the same and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks. Section two empowers the council to require the owners and occupants of adjacent lots to construct and maintain sidewalks, and section three is as follows: "The council shall also have power to cause and require the owners and occupants of any lot or premises to remove all snow and ice from the sidewalks in front of or adjacent to such lot and premises, and to keep the same free from obstructions, encroachments, incumbrances, filth, and other nuisances."

Section four provides that if any owner or occupant shall fail to perform any duty required by the council in respect to sidewalks, the council may cause the same to be performed, and levy a special assessment to meet the expense on the lot or premises adjacent to and abutting on the sidewalk.

Section six is as follows: "If any owner, occupant, or person in charge of any lot or premises shall neglect to repair any sidewalk in front of or adjacent to such premises, or to remove any snow or ice therefrom, or to keep the same free from obstructions and incumbrances, in accordance with the requirements of the ordinances and regulations of the council, he shall be liable to the city for the

amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect." General Laws 1873, pp. 244, 325, 326.

Acting under the authority conferred by this act, the city council adopted an ordinance whereby it was provided that the owner or occupant of any house or building, or person entitled to the possession of any vacant lot, or person in charge of any church or other public building, or any street, alley or public space, shall not permit the sidewalk and gutter adjoining the same to be obstructed by snow, ice, filth, dirt or other incumbrance, and where ice is formed on any sidewalk and gutter, such owners, occupants, or persons having charge, or entitled to possession of property adjoining, as above provided, shall within twenty-four hours after the same has formed remove the same or cause sand, sawdust or ashes to be strewn thereon.

The defendant, it is alleged, failed to remove within twenty-four hours, as required by this ordinance, the ice which had formed on the sidewalk in front of its premises, and the plaintiff sustained a severe injury by slipping and falling thereon.

It is said on behalf of the plaintiff that the obligation to keep the sidewalks free from snow and ice is imposed as a duty to all persons who may have occasion to use the walks in passing and re-passing, and that the neglect to do so, in consequence of which any one lawfully using the walk is injured, is a neglect of duty to him, and entitles him on well-recognized principles to maintain an action. *Couch v. Steel*, 3 El. & Bl. 402; *Aldrich v. Howard*, 7 R. L. 214.

To maintain this proposition it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. *Atkinson v. Water Works Co. L. R.*, 6 Exch. 404.

The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. In this case the duty was to keep the sidewalks free from obstructions. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is

whether it is also a duty to each individual making use of the walks.

An obstruction by snow or ice may make the use of a walk dangerous, or may wholly preclude its use for the purpose for which walks are constructed. If the duty to keep the walk free from obstructions is a duty to individual travellers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of use but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction, as by one who slips and falls in a dangerous place. Moreover as the lot owner is required to keep the walk free from all nuisances, an individual traveller who maintains the proposition that this is a duty to him must be entitled to bring suit whenever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot owner would add greatly to his common-law liabilities, and it is not easy to draw the line which should definitely limit and confine his liabilities.

But if we look a little further into the statute under which the city is incorporated, we shall see that all its provisions respecting sidewalks, so far as they impose duties upon the owners of adjoining or abutting lots, have one common object, namely, to provide suitable and safe passage ways for foot passengers by the side of the public streets, and to keep these in condition for safe use. The expense of such ways is imposed on the owners of adjacent lots, and these owners must keep them free from encroachments. Will it be claimed that if the city council shall require a lot owner to construct a sidewalk in front of his premises, and he shall fail to obey the requirement, every person who should come upon the street desiring to pass on foot where the walk should be, and who shall be precluded from doing so by the walk not being constructed, may bring suit against the lot owner for the neglect to build it as a neglect of duty to the traveller himself? He is damnified in that case as clearly as when he falls upon a dangerous walk and is hurt; though the damage may perhaps be insignificant.

But it is clear, we think, that the duty to build the walk is only a public duty, and the duty to keep it in condition for use is also a public duty. Exactly what force is to be given to the provision of statute that the lot owner shall be liable to the city for all damages which the city may be compelled to pay for his default, we need not consider in this suit. It is enough to say here that an action grounded on that particular provision of the statute could only arise after the city had been rendered liable in a suit against it.

If the statute contemplated public duties only, the city ordinance could not go further and give individual rights of action. But neither, we think, has it attempted to do so.

The judgment of the circuit court must stand affirmed with costs.

The other Justices concurred.

MOONEY

v.

UNION PAC. RY. Co., Garnishee, etc.

(Advance Case, Iowa. December 15, 1882.)

A debt due from one who may be sued in this state to a non-resident of this state, for services performed in the state of his residence, may be garnished in a suit instituted against him in the courts of this state,—personal service, or service by publication, having been duly made on him,—although his salary has always been paid in the state where he lived, and would have been exempt by the laws of that state.

APPEAL from Pottawattamie circuit court.

This is an action brought in the court below upon a promissory note against the defendant C. F. Rollins. The Union Pacific Railway Company was attached as garnishee. There was a trial between the plaintiff and garnishee, and a judgment was rendered for the plaintiff, from which the garnishee appeals.

J. S. Shropshire and Baldwin & Wright, for appellant.

Clinton, Hart & Brewer, for appellee.

ROTHOCK, J.—1. The cause was submitted to the court below, and is submitted in this court, upon an agreed statement of facts, of which the following is the substance: The appellant was indebted to the defendant Rollins in the sum of \$300, at the time the answer was filed. This sum was earned by Rollins as a mechanic in the employment of appellant in the state of Nebraska. He was hired in that state, and it was the custom of appellant to pay the wages of employees thus hired within that state, but there was no express contract as to the place where the wages should be paid. The general offices, and the offices of the paymaster and auditor, of appellant are in the state of Nebraska. By the laws of Nebraska \$200 of the amount due Rollins would have been exempt to him, and not liable to seizure for the payment of his debts in any suit brought in the courts of that state, being the amount of his wages for 60 days preceding the service of the garnishment notice.

The original notice was served on Rollins personally in the state of Nebraska, and the garnishment process was served on the appellant in Pottawattamie county, in this state. The appellant was then and is now a corporation organized under the laws of the United States, and engaged in the operation of a line of railway beginning at a point within the city of Council Bluffs, in Pottawattamie county, Iowa, and extending westward through the state

of Nebraska. The plaintiff and Rollins were at the commencement of the suit and still are residents of Nebraska, and the plaintiff knew when he commenced this suit that by the law of Nebraska, if there sued, the defendant would have two months' wages exempt from all process. Section 2618 of the Code provides that service of an original notice may be made by publication "in actions brought against a non-resident of this state or a foreign corporation having in this state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way," and debts due the defendant in an action aided by attachment are attached by the garnishment thereof. Section 2967. And it is a sufficient cause for attachment that the defendant is a non-resident of the state. Section 2951. There was no service by publication in this case, but personal service was made upon the defendant in the state of Nebraska. This supersedes the necessity of service by publication (section 2621), and such personal service has the same force and effect, and the same jurisdiction is acquired as would be if the service were by publication. *Dorrance v. Preston*, 18 Iowa, 396.

It is contended by counsel for appellant that the debt from the railroad company to Rollins was not liable to attachment, because its situs was not in this state, but in the state of Nebraska. The facts show that the money due Rollins was earned in Nebraska, and that he was a resident of that state, and that it was the custom of the railroad company to pay the wages of such employees within the state of Nebraska. The doctrine that a debt can have no locality separate from the party to whom it is due is applicable upon the question of the situs of credits for the purposes of taxation. Such is the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, and other authorities cited by counsel for appellant. But this rule, or legal fiction, as it is denominated in the books, cannot be applied in this state to attachment proceedings against non-resident defendants. To do so would abrogate the sections of the statute above cited, because, if all debts must be located with and attach to the person of the debtor, there could be no garnishment of a person in this state owing a debt to a person resident of another state.

As is said in *Green v. Van Buskirk*, 7 Wall. 139, attachment laws "necessarily assume that property has a situs entirely distinct from the owner's domicile." "The plaintiff occupies, as against the garnishee, the position of the defendant, with no more rights than the defendant had, and liable to be met by any defence which the garnishee might make against an action by the defendant." *Daniels v. Clark*, 38 Iowa, 556. And we think if the defendant Rollins could have maintained an action against the appellant in this state for the recovery of his wages, it follows that the debt was within this state and subject to attachment. Whether he could have maintained

such action does not depend upon the question as to the custom to make payment in Nebraska, but whether appellant was subject to the jurisdiction of the courts of this state, which we will now proceed to consider.

2. It is contended that the court had no jurisdiction over the appellant, and a number of cases are cited which hold that where the garnishee is a non-resident, and is merely temporarily within the jurisdiction of the court, and is there served with process, the service is bad and will not hold property in his hands belonging to the non-resident defendant. Authorities are also cited to the effect that a foreign corporation cannot be garnished, although it may have officers and members within the jurisdiction of the court, as well also as its books and records.

We have no occasion to discuss these authorities, because the Union Pacific Railroad Company is not merely temporarily within the jurisdiction of the courts of this state, nor is it a foreign corporation. It is a corporation organized under the laws of the United States, and engaged in the operation of a line of railway in Pottawattamie county, Iowa, and extending west through the state of Nebraska. It is as much a citizen of Iowa as it is of Nebraska, and there is no provision of the laws of the United States locating it in any state. But suppose we should concede it to be a foreign corporation, operating a line of railway in another state and extending into this state: under section 2582 of the Code actions may be brought against railway corporations in any county of this state through which the line or road thereof passes or is operated, and this applies to foreign corporations as well as those organized under the laws of this state. The reports of cases in this court are full of actions brought against foreign railroad corporations operating roads in this state, and no one has ever questioned the jurisdiction. If we were to hold that these corporations are not subject to the jurisdiction of our courts, the same as a natural person resident within the state, we would release at least three of the trunk lines which traverse the state from east to west from all subjection to the jurisdiction of our courts.

3. Lastly, it is insisted that this action was instituted by plaintiff in the court below with the fraudulent purpose of preventing the defendant from pleading the exemption laws either of the state of Nebraska or of this state, and to defraud and cheat him out of the exemptions he is entitled to under the laws of Nebraska.

We have determined that the circuit court had jurisdiction of the defendant, and also of the appellant, so far as to authorize the appropriation of the debt. There can be no doubt that there is an absolute right in a non-resident of this state to institute and maintain actions in our courts. We have held that if a person residing in one jurisdiction be induced under false pretences or representations to come into another for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been

fraudulently obtained, and the judgment will be void. Dunlap v. Cody, 31 Iowa, 260. In that case, and in all the authorities cited therein, there was actual fraud practised to obtain the jurisdiction. The groundwork of all the cases upon that subject is that if unlawful or fraudulent means are resorted to for the purpose of bringing a party within the jurisdiction of a court, the law will interpose and afford a suitable remedy, because no lawful thing founded upon an unlawful act can be supported.

In the case at bar the plaintiff was guilty of no actual fraud. He used no unlawful means to acquire jurisdiction of the parties or subject matter, and while the proceeding operates as a hardship on the defendant, we cannot say that jurisdiction was obtained by fraud, nor by a resort to any unlawful means. Affirmed.

STATE, EX REL. MOUNT PLEASANT CEMETERY CO.,

v.

PATERSON, NEWARK, AND NEW YORK R. R. CO., and NEW YORK, LAKE ERIE, AND WESTERN R. R. CO.

(43 *New Jersey Law Reports*, 505.)

Though a writ of mandamus will lie at the instance of a private individual against a corporation, to compel performance of a duty enjoined by its charter, to be executed for the benefit of the relator, or the class of individuals to whom he belongs, the allowance of the writ in such cases must be controlled by the fundamental principle that it is the absence of an adequate legal remedy that gives the court jurisdiction to proceed by mandamus. Two things must concur—a specific legal right, and the absence of an effectual legal remedy.

The charter of the Paterson and Newark R. R. Co. authorized the company to construct its railroad along the Passaic River, from Belleville to Newark, and to acquire the rights of the shore-owners by purchase or condemnation, with a proviso that in passing by the lands of the Mount Pleasant Cemetery, the said railroad should be constructed entirely outside, and to the east, of the present stone wall embankment of the cemetery grounds, and near the line of high water in said Passaic River; and that before entering upon the said lands, the said railroad company should enter into an agreement with the Mount Pleasant Cemetery Co. to construct a suitable stone wall, not less than six feet high, on the line between said railroad and the cemetery grounds. The company located its road outside of the line indicated, and, before it commenced the construction thereof, executed and delivered to the cemetery company a bond in the penal sum of \$80,000, conditioned to construct a wall in compliance with the charter, within three years. On application for a mandamus to compel the company to build the wall—*Held*:

1. That it was the legislative purpose to secure to the relator a satisfactory location of the railroad, and an agreement for the erection of a wall—to be enforced in the usual method by which contracts may be enforced, by action at law or by bill for specific performance; and that the specific duty

imposed on the company by its charter in this respect had been fully performed.

3. That the relator had adequate legal remedy on the contract, and that, if that remedy had become inefficacious, by reason of delay and the intervening insolvency of the obligor, the relator could have no relief by mandamus.

On application for a writ of alternative mandamus.

The Mount Pleasant Cemetery Co. was chartered in 1844. Said charter and any supplements are regarded as in evidence (pro ut the same). Pamph. L. 1844, p. 19.

The charter and supplements thereto of the Paterson and Newark R. R. Co. are also regarded as in evidence (pro ut the same). Pamph. L. 1864, p. 663; 1866, pp. 86, 880; 1871, p. 979.

The railroad track of said Paterson and Newark R. R. Co. was constructed by said company in front of said cemetery grounds, below high-water mark in Passaic River, and there now exists. Such construction was completed during the years 1866 and 1867.

Prior to such construction, said Paterson and Newark R. R. Co. made its bond to the Mount Pleasant Cemetery Co. (pro ut the same). Said bond is dated August 17th, 1866, and is in the penalty of \$30,000. Its condition recites that, by a supplement to the charter of the railroad company, it was required, before entering on the lands of said cemetery company, to enter into an agreement with said cemetery company, to build a suitable stone wall, not less than six feet high, on the line between said railroad and said cemetery grounds; that the railroad company were about to enter upon said lands, and had agreed, and did thereby agree to construct said stone wall within three years; and it then provides that if the said railroad company, or their successors or assigns, should and did well and truly construct, within three years from the date of said bond, a suitable stone wall, not less than six feet high, above the surface of the ground, with a proper foundation laid in cement to the water line, and that part above said line to be laid in good lime and sand mortar, the line of said wall to be designated by said cemetery company, then the obligation was to be void, else to remain in force.

September 8th, 1868, the Paterson and Newark R. R. Co. made and delivered a lease of their railroad and franchises to the Erie R. R. Co., which thereafter occupied and operated the same.

In 1870, the said The Paterson and Newark R. R. Co. became insolvent; insolvent proceedings against the same were thereupon instituted in the Court of Chancery of New Jersey, and a receiver of the property and franchises thereof appointed by said court, under and in pursuance of the act entitled "A supplement to an act to prevent frauds by incorporated companies," approved April 15th, 1846, which supplement was approved March 17th, 1870 (pro ut the same, Pamph. L., p. 55), and such proceedings were thereupon

had in said court, in pursuance of the last-mentioned act, that afterwards, by the order of said court, a sale of the property and franchises of the said The Newark and Paterson R. R. Co. was made to Louis D. Rucker and others, which sale having been confirmed by said court, a deed of conveyance of said property and franchises was executed and delivered by the said receiver to the said purchasers on the 2d day of November, 1871.

The said Rucker and others, purchasers of said property and franchises, within six months after said sale, and on the 16th day of January, 1872, and by virtue and in pursuance of the last-mentioned act, accepted the charter of the said The Paterson and Newark R. R. Co., whose property and franchises they had purchased, under the corporate name of The Paterson, Newark, and New York R. R. Co., and made a certificate to that effect, bearing date the day and year last aforesaid, and filed the same, pursuant to the last-mentioned act, on the 19th day of January, 1872, and thereupon became a corporation by the name of "The Paterson, Newark, and New York R. R. Co.," which now holds the property and franchises, subject to the said lease to the Erie Ry. Co.

The Erie Ry. Co. became insolvent in 1873, a receiver of its property and franchises was duly appointed, a mortgage on its said property and franchises was foreclosed, and a sale thereof afterwards had and made, and the purchasers of the said property and franchises, including said lease, formed and organized a new corporation under the charter of the said The Erie Ry. Co. in pursuance of the statutes in such case made and provided, by the name of "The New York, Lake Erie, and Western R. R. Co."

The said certificates of organization of the said companies so as aforesaid organized are to be considered in evidence, and may be referred to, if necessary, on the argument of the rule to show cause.

It is admitted that no demand was made by said cemetery company for the erection of said wall, nor any proceedings taken to enforce said bond until the year 1878, or thereabouts. Nor before that time was any notice given to the Erie Ry. Co., its receiver, or to either the Paterson, Newark, and New York R. R. Co., or the New York, Lake Erie, and Western R. R. Co., of the existence or non-fulfilment of the said bond or of the agreement to build said wall, which has never been built.

It is further admitted that no proof exists of the designation of any line of said proposed wall being ever made by said cemetery company.

Argued at June Term, 1881, before Justices Depue and Van Syckel.

John W. Taylor, for the relator.

C. Parker, for the respondents.

DEFE, J.—The relator is the owner of a plot of ground used for cemetery purposes, lying upon the banks of and adjacent to the Passaic River, a tidal stream.

The Paterson and Newark R. R. Co. was incorporated by a special act of incorporation, passed February 22d, 1866. Pamph. L., p. 86. The company was authorized to construct its railroad along the Passaic River, from Belleville to Newark, and to acquire the rights of the shore-owners by purchase or condemnation. In constructing its railroad between Belleville and Newark, the track was laid in front of the cemetery grounds below high-water mark. The legal effect of this part of the company's charter was adjudged by the Court of Errors in *Stevens v. Paterson and Newark R. R. Co.*, 5 Vroom, 532.

The road was built in 1866 and 1867. Financial embarrassments and insolvency having intervened in 1870, the property and franchises of the company, on the 2d of November, 1871, were sold to purchasers who effected a reorganization of the company under the name of The Paterson, Newark and New York Railroad Company, pursuant to the act of March 17, 1870. Pamph. L., p. 55.

On the 8th of September, 1868, and before the sale under the insolvent proceedings, the railroad and franchises of the company were leased and demised to the Erie Railroad Company. The sale in 1871 was made subject to this lease.

In 1875, the Erie Railroad Company in turn became insolvent, and its property and franchises were sold to purchasers, who reorganized under the name of The New York, Lake Erie and Western Railroad Company.

The charter of the Paterson and Newark Railroad Company, in the section granting the powers above mentioned, contained this proviso:

"Provided, that, in passing by the lands of the Mount Pleasant Cemetery, the said railroad shall not encroach upon the lands thereof which are used for burial purposes in said cemetery; but the said railroad shall be constructed entirely outside, and to the east, of the present stone wall embankment of the cemetery grounds, and near the line of high water in said Passaic river; and before entering upon the said lands, the said railroad company shall enter into an agreement with the Mount Pleasant Cemetery Company to construct a suitable stone wall, not less than six feet high, on the line between said railroad and the cemetery grounds."

The relator applies for a writ of mandamus, to be directed to the Paterson, Newark and New York Railroad Company—the successor of the Paterson and Newark Railroad Company—and to the New York, Lake Erie and Western Railroad Company—the successor of the Erie Railroad Company—commanding them or one of them to build or construct a suitable stone wall, not less

than six feet high, on the line between the railroad and the cemetery grounds of the relator.

A writ of mandamus will lie at the instance of a private individual against a corporation, to compel performance of a duty enjoined by its charter to be executed for the benefit of the relator or the class of individuals to whom he belongs. The allowance of this writ to compel a company to treat for the purchase of lands—to issue a warrant for a jury to assess damages—to build bridges, to provide water-ways and the like—are instances of such a use of the writ. *Reock v. Mayor, etc., of Newark*, 4 Vroom, 129; *Rex v. Prop. of Nottingham Water Works*, 6 A. & E. 355; *Reg. v. Birmingham C. Co.*, 4 Jur. 173; *Reg. v. E. C. R. R. Co.*, 5 Id. 365; *Reg. v. N. M. R. R. Co.*, 2 Railw. Cas. 1; *Reg. v. N. and B. R. R. Co.*, 4 Railw. Cas. 112; *Reg. v. Y. and N. M. R. R. Co.*, 3 Id. 764; *Reg. v. M. and L. R. R. Co.*, 1 Id. 523. But the allowance of the writ in such cases must be controlled by the fundamental principle that it is the absence of an adequate legal remedy that gives the court jurisdiction to proceed by mandamus. Two things must concur to authorize the issuing of a mandamus—a specific legal right, and the absence of an effectual legal remedy. 2 Dill. on Mun. Corp. §§ 665, 686; *State v. Holliday*, 3 Halst. 205; *State, ex rel. Nicholson Pav't Co. v. Newark*, 6 Vroom, 396; *State, ex rel. Little v. Township of Union*, 8 Id. 84; *Queen v. Hull and Selby R. R. Co.*, 6 Q. B. 70; *Moses on Mandamus*, 176, 178; 2 Redf. on Railways, 279, 286.

The specific legal duty enjoined upon the Paterson and Newark Railroad Company by its charter, with respect to the relator's lands, was that it should construct its railroad entirely outside and to the east of an existing stone wall embankment, and near the line of high-water mark in the river, and that, before entering upon the said lands, the railroad company should enter into an agreement with the cemetery company to construct a suitable stone wall, not less than six feet high, on the line between the railroad and the cemetery grounds.

The railroad company located its road outside of the line indicated, and, before it commenced the construction thereof, entered into a bond to the relator, bearing date on the 17th of August, 1866, in the penal sum of \$30,000, in which, after reciting the above provisions of its charter, the railroad company did agree to construct, within three years, a suitable stone wall, not less than six feet high, on the line between its railroad and the cemetery grounds, with condition, that if the said company should well and truly construct, within three years from the date of said bond, a suitable stone wall, not less than six feet high above the surface of the ground, with a proper foundation laid in cement to the water line, and that part above said line to be laid in good lime and sand mortar, the line of said wall to be designated by said cemetery

company, then the said obligation was to be void, else to remain in full force. It is to be inferred from the state of the case and the briefs of counsel that this bond was delivered to the relator, and that the specifications of the work were mutually agreed on. At least, no point is made that the company neglected or refused to execute and deliver to the relator an agreement in compliance with the charter.

In the act incorporating the railroad company, it was the legislative purpose to secure to the relator a satisfactory location of the railroad, and an agreement for the erection of a wall, to be enforced in the usual method by which contracts can be enforced — by action at law or by bill for specific performance. The specific duty imposed on the company by its charter, in this respect, has been fully performed.

The bond which was executed and delivered complied with the terms of the charter. On it the relator had an adequate remedy, according to the nature of the case, either by action or proceedings for specific performance. The agreement was executed in August, 1866. The road was constructed in 1866 and 1867. The company did not become insolvent until 1870, and its corporate existence was not extinguished until the sale of its property and franchises in 1871. The relator had adequate legal remedy on its contract. If that remedy has since become inefficacious by reason of delay, the relator cannot have relief by mandamus. Duties imposed on a corporation, not by virtue of express law, or by the conditions of its charter, but arising out of contract relations, will not be enforced by mandamus. *High on Ex. Rem.*, § 321.

The writ should be refused, and the rule to show cause be discharged.

JOHN E. DONNELL, in equity,

v.

PORTLAND AND OGDENSBURGH R. R. CO., FIRST NATIONAL BANK
OF PORTLAND AND JOHN W. DANA.

(73 *Maine Reports*, 567. *June 1, 1882.*)

By the statute 1876, c. 101, as amended by statute 1877, c. 158, a new, more direct and efficacious remedy to a creditor was created by conferring upon the Supreme Judicial Court jurisdiction in equity, to reach and apply in payment of a debt due to such creditor any property, right, title or interest, legal or equitable, of his debtor residing or found in this State, which cannot be come at to be attached on a writ or taken on execution in an action at law, and which is not exempt by law from attachment and seizure.

The proceeding is in the nature of an equitable trustee process, to enable

the creditor in one process to establish the validity and amount of his claim against his debtor, and compel the appropriation of the debtor's property of whatever kind, provided it be not exempt or within reach of legal process, in the hands of some third person to the payment of his debt.

There must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. An officer of a corporation cannot be held to sustain that relation to the corporation as a debtor.

On report.

Bill in equity heard on bill, answer and proof.

The material facts are stated in the opinion.

William L. Putnam, for the plaintiff, cited *Silloway v. Ins. Co.*, 8 Gray, 199; *Barry v. Abbott*, 100 Mass. 396, and cases there cited; *Tucker v. McDonald*, 105 Mass. 423; *Bresnihan v. Sheehan*, 125 Mass. 11.

It is claimed that we cannot hold checks in the hands of Dana, because he was treasurer and held them in his official capacity.

1. We say first, that even if these checks were by contemplation of law in the possession and control of defendant debtor corporation, so that they were in no sense in the possession or control of Dana, that would be no answer under the circumstances of this case.

At the time when Dana negotiated, and for that purpose indorsed these checks, all parties were aware of the nature of this suit.

Serving the bill upon the railroad corporation and the bank, attached these checks as effectually as a pile of wood might have been attached by a writ at common law; and every one who was made party to the bill, who knowingly and voluntarily aided in disposing of the checks and defeating the attachment, is as much holden for the debt as would be a person knowingly carrying away from the officer the pile of wood. The advantage here is, that in equity all rights, including rights against the wrong-doer who is a party to the bill, can be closed in one suit. Of course the debtor corporation would be primarily liable to make the tort good; but the corporation being insolvent, the burden falls on Dana, who has been an active participant therein; and he must protect himself as far as he can by the indemnity promised in the above vote of July 1, A. D. 1880, upon which he saw fit to rely. *Nelson v. Bridges*, 2 Beavan, 239; *Andrews v. Brown*, 3 Cush. 130; *Story Eq. § 794-9*. By filing the bill, complainant acquired a lien, and Dana by acting to defeat that lien, became a wrong-doer in equity. *McDermott v. Strong*, 4 John. Ch. 687.

2. But there is a remedy against Dana by a more direct principle. Although he was treasurer of the corporation, yet with reference to the checks his identity was not absorbed in the corporation. "These checks were in the possession of the treasurer," and their form was such that they could not be, and at least were not nego-

tated without his indorsement. See *Farmington Savings Bank v. Fall*, 71 Maine, 52.

By reason of the fact of the form of these checks, there is no principle involved in the ordinary rule, that funds in the hands of agents cannot be trustee, which furnishes any analogy applicable to this proceeding in equity.

In *Pettingill v. Androscoggin Railroad Company*, 51 Maine, p. 370, it was held that railroad station agents could not be holden by trustee process for funds in their hands of the corporation employing them. The law is undoubtedly the same in Massachusetts; yet in *Silloway v. Ins. Co. ante*, promissory notes were held upon this equitable process in the hands of the general agent of the debtor corporation. See *Phoenix Ins. Co. v. Abbott et al.*, 127 Mass. 558.

Webb and Haskell, for the defendants, cited *Devoe v. Brandt*, 53 N. Y. 462; *Schutt v. Large*, 6 Barb. 373; *Jordan v. Parker*, 56 Maine, 557; 1 Story Eq. § 410; *Lindsay v. Lambert B. and L. Assc.*, 4 Fed. Rep. 48; *Sprague v. Steam Nav. Co.*, 52 Maine, 592; *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558.

Charles F. Libbey, for the First National Bank, one of the defendants.

VIGOR, J.—For many years the only mode by which a creditor could reach and appropriate to the payment of a debt due to him the notes, bonds and other like property of his debtor which could not be reached by mesne or final process under the then existing laws, was to reduce his claim to judgment, arrest his debtor on the execution, and then wait for him to disclose and surrender such property. R. S., c. 113, § 36. These statutory provisions allowed sufficient time for debtors to so arrange their affairs as frequently to render the remedy of but little practical value.

By the stat. of 1876, c. 101, 1877, c. 158, a new, more direct and efficacious remedy was created by conferring upon this court jurisdiction in equity, on a bill by a creditor, to reach and apply in payment of a debt due to him any property, right, title or interest, legal or equitable, of his debtor residing or found in this State, which cannot be come at to be attached on a writ or taken on execution in an action at law against such debtor, and which is not exempt by law from attachment and seizure.

The essentials of these provisions seem to be, a creditor, a debtor in this State having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it cannot be reached by common law process against the debtor; and the property sought to be reached held by some third person who may be considered an equitable trustee of the debtor.

The intent of the statute, therefore, is to enable a single creditor alone, without first fruitlessly exhausting all legal remedies or re-

ducing his claim to judgment, by this one proceeding in the nature of an equitable trustee process, to establish the validity and amount of his claim against his debtor and compel the appropriation of the debtor's property of whatever kind, provided it be not exempt or within the reach of legal process, in the hands of some third person, to the payment of his debt. This construction has been given to a somewhat similar statute by the court in Massachusetts in numerous cases, among which are the following: *Silloway v. Columbia Ins. Co.*, 8 Gray, 199; *Sawyer v. Bancroft*, 12 Gray, 365; *Crompton v. Anthony*, 13 Allen, 33, 37; *Bresnihan v. Sheehan*, 125 Mass. 11; *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558.

The plaintiff contends that his case is within the new remedy. His material allegations are, that he is the *bona fide* holder of certain bonds with semi-annual interest coupons annexed thereto, issued by the defendant railroad corporation with four other connecting railroad corporations not within this jurisdiction, eighty of which coupons amounting to \$2400 are due and unpaid; that all these corporations are insolvent and neither of them has any attachable property in this State; that the defendant corporation has on deposit in the defendant bank a large amount of money for which the bank has given its cashier's checks payable to the defendant, treasurer of the defendant railroad company, and which are in his personal custody and under his personal control so that they cannot be come at to be attached or seized on execution; and he seeks to have the bank and Dana apply the same to the payment of his coupons.

But from the bank's answer and the deposition of Dana it appears that the bank had no money of the railroad corporation; but that Dana, prior to the service of the bill on its cashier, purchased of the bank four cashier's checks payable to the order of Dana as treasurer of the railroad corporation, issued without any knowledge on the part of the bank of the purpose of the purchase or of the use to be made of them; that prior to the service of the bill two of the checks had been paid on presentation thereof by indorsees, and the remaining two were paid, on the morning of the next day after service, to *bona fide* indorsees thereof, without notice of any equities attaching thereto. Upon these facts the plaintiff does not ask for a decree against the bank. This disposes of one of the trustees.

From his answer and deposition it appears that Dana, as treasurer and not otherwise, on and prior to June 30, 1880, in order to meet certain first mortgage coupons of \$24,000, of the defendant railroad corporation, due and payable the next day (July 1), had accumulated the checks before mentioned amounting to \$23,072.27, two of which he appropriated towards the payment of certain of the said first-mortgage coupons the day before they were payable and before service of the bill upon him. That on the morning of

the next day after the service of the bill he as treasurer, pursuant to the order of the president and directors of said defendant railroad corporation, negotiated the two remaining checks to certain innocent parties having no notice of the pendency of this suit, in payment of certain of said first mortgage coupons payable that day and held by them; and the balance of the proceeds thereof received from said parties he applied in payment of the remaining coupons.

There can be no doubt that neither the bank nor Dana could be charged in law as the trustee of the railroad corporation for and on account of the checks. *R. S., c. 86, § 55; Clark v. Viles, 32 Maine, 32; Skowhegan Bank v. Farrar, 46 Maine, 293; Bowker v. Hill, 60 Maine, 172, 175.* But by this process all kinds of property, including negotiable paper, may be reached.

And neither could Dana be held at law as the trustee for any kind of property belonging to the corporation in his official custody as treasurer; for that is the way and the only way that a corporation can hold its funds. The possession of the treasurer is the possession of the corporation; and the treasurer cannot be charged as the trustee of his corporation for its property in his official custody, for the reason that he is *quoad hoc* the corporation. *Pettingill v. And. R. R. Co., 51 Maine, 370; Sprague v. Steam Nav. Co., 52 Maine, 592; Bowker v. Hill, supra.*

We do not perceive how it can or why it should be in anywise different in an equitable trustee process. There must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. *Phoenix Ins. Co. v. Abbott, supra.* But if its officers can be summoned as trustees of the corporation, then the action is in substance against the corporation as debtor with the corporation as trustee. *Pettingill v. And. R. R. Co., supra.*

We are aware that in *Silloway v. Columbia Ins. Co., supra*, the only trustee summoned was the agent of the company resident in Massachusetts, the company being located in South Carolina. Our answer is that the question was not raised in that case. So several cases have been maintained in Massachusetts wherein no equitable trustee was made a party defendant because the question was not raised. *Soule, J., in Phoenix Insurance Co. v. Abbott, 127 Mass. 561.* Again, the Massachusetts statute, where *Silloway v. Columbia Ins. Co.* was decided, expressly provided for the maintenance of the bill when the debtor did not reside in the commonwealth—the purpose of the statute being to reach property belonging to a non-resident debtor. *Bigelow, J., in Davis v. Worden, 13 Gray, 306.*

Inasmuch therefore as there is no equitable trustee holden, the bill must be dismissed with costs.

Appleton, C. J., Walton, Barrows, Danforth and Symonds, JJ., concurred.

THE NEW ORLEANS, MOBILE AND TEXAS R. R. CO. AND OTHERS

v.

HENRY ELLERMAN.

(Advance Case, U. S. Supreme Court. March 20, 1883.)

The appellee, Ellerman, by contract with the city of New Orleans, became the lessee of all the public wharves owned by the city for a period of near five years, with all the rights, privileges and franchises of the city in regard to said wharves. The legislature having authorized the railroad company to construct a wharf of its own for the accommodation of vessels doing business in connection with its road, that company permitted other vessels to use the wharf for which it charged compensation. On a bill filed by Ellerman to enjoin the use of appellant's wharf this court held: That Ellerman had no such exclusive right by his contract with the city to have all vessels land at the wharves leased by him from the city and pay him for so doing, as would enable him to sustain his suit. Vessels were not bound to use his wharves if they chose to land at others, and whether the railroad company exceeded their chartered rights in receiving compensation for the use of their wharf from those doing no business in connection with their railroad was a question in which he had no special interest beyond that of the general public.

APPEAL from the Circuit Court for the district of Louisiana.

The statement of the case in the opinion of the court is complete.

The case was argued at the last term of the court by Mr. John A. Campbell and Mr. Bayne, for appellants, and by Mr. Durant, for appellee, and after consideration by the court it was ordered to be re-argued at this term.

It was accordingly argued again this term by Mr. Cadwallader and Mr. Bayne, for appellants, and Mr. Horner, for appellee, mainly on the question suggested by the court, whether Ellerman was a proper party to sustain a bill for injunction in the case, or whether the State of Louisiana alone could bring such a bill.

MATTHEWS, J.—The New Orleans, Mobile and Texas R. R. Co., one of the appellants and the principal defendant below, is a corporation of the State of Alabama, by the original name of New Orleans, Mobile and Chattanooga R. R. Co., which has constructed a line of railroad from Mobile to New Orleans. It was authorized by its charter "to obtain by purchase or grant from any person or corporation, and afterwards maintain, manage, use and enjoy any railroad property, and the appurtenances thereto, or any steamboats, piers, wharves, and the appurtenances thereto, that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage in connection with its railroads." *Session Acts of Alabama, 1866.*

The General Assembly of the State of Louisiana, on August 16, 1868, passed an act which recognized it as a body corporate, and authorized it to exercise its franchise in Louisiana, and expressly conferred upon it power "to construct, establish, or purchase in the State of Louisiana, and thereafter to own, maintain and use suitable wharves, piers, warehouses, steamboats, harbors, depots, stations and other works and appurtenances connected with and incidental to said railroad and the business of said company, and by the directors of said company deemed necessary and expedient for said company to own and manage."

In 1869 it was further enacted by the legislature of that State, "that the said company, with the consent of the owners of the lands fronting on any navigable water-course, or after such lands have been acquired by the company by purchase, release, donation, or in any other manner, in accordance with the laws of the State of Louisiana, may erect, construct, and thereafter maintain and use wharves, warehouses, depots, or other buildings and structures in and upon the margins, or upon that portion of the margins reserved to public use, of any and all navigable rivers, bayous, or water-courses in the State of Louisiana, wherever the same may be deemed, by a majority of the directors of the company, necessary and requisite for the legitimate and convenient transaction of the business of the company."

On March 6, 1869, the General Assembly of Louisiana passed a joint resolution, having the force of law, granting to the railroad company "the right to enclose and occupy for its purposes and uses, in such a manner as the directors of said company may determine, that portion of the levee, batture and wharf in the city of New Orleans, between the street laid out between Pilie street and the Mississippi River, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street) of the batture rights owned by said company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf for said company, or any steamships or vessels using said wharf, by and with the consent of said company, and not receiving or discharging cargo at or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the city of New Orleans. Said wharf shall be maintained and kept in repairs by said company." All laws and parts of laws and all ordinances and parts of ordinances conflicting with the provisions of this joint resolution were thereby repealed.

At the date of the passage of the joint resolution the railroad company was the owner by previous purchase of the land described in it, and in possession, using it for the purposes of a depot and for other railroad purposes, and as a wharf, appropriate structures

having been built for that use. A portion of this property was leased in June, 1875, by the receivers of the railroad, appointed under proceedings to foreclose, for twelve months, at the sum of \$7200, to Roberts and Witherspoon, who were made defendants to the bill, the use and employment of the wharf granted by such lease consisting "in the mooring of vessels coming to the consignment, custody, or care of the parties of the second part (the lessees) or to either of them, and the loading and unloading of cargoes upon all vessels of this kind, with the full consent of the parties of the first part, exempt from wharf and levee dues, according to the terms of the said joint resolution."

The object of the bill filed by the appellee was to enjoin the execution of this contract, and the use and employment of the wharf described therein in the manner contemplated by it.

The claim of the complainant, Ellerman, the appellee, was based on a contract between himself and the city of New Orleans, entered into June 29, 1875. This contract purports to be a grant from the city to Ellerman, for a term of four years and eleven months from June 29, 1875, of the contract for building and repairing the wharves and levees according to certain specifications on file, and for the payment of debts contracted on account of them, and for transferring the revenues of the same for the said term, agreeable to the terms of a certain ordinance and resolution of the city, all of which are set out in the contract. The specifications state the particulars of the required repairs and extensions of the wharves. The subject-matter of the ordinance is declared to be the sale of "the revenues of the wharves and levees of the city of New Orleans, collectable under existing ordinances upon all ships, vessels, steamships, steamboats, flatboats and water-craft of any and every description, upon the terms and conditions" therein set forth. The purchaser was to assume certain specified liabilities of the city, connected with the wharves, and it was provided that the sale should be awarded to the bidder who would assume to discharge the obligations set forth, in consideration of the transfer of the revenues assigned, in the shortest time. The purchaser should be subrogated to all the rights and privileges of the city of New Orleans, to sue for and collect the revenues; and it was understood and agreed that "the city only undertakes to transfer only such rights as she possesses, and the purchaser takes the said revenues subject to all the rights now held by other persons by way of lease, privilege, contract, or by law, and the purchaser shall, in reference to them, be subrogated only to the rights of the city." It was provided that the purchaser should take possession of the wharves, landings and levees in the condition in which the same might be at the time, and should repair the same and keep them in good order and condition during the term stipulated. It was further provided that if, from overpowering force, the city should not be

able to protect the transferee in receiving the said revenues, or if they should by any such cause be diminished over one third, the transferee might, after satisfying all obligations incurred under the contract up to the time, surrender it and be discharged from further responsibility; but the city, it was expressly declared, in nowise guaranteed the payment of the wharfage and levee dues, the collection of which are to be enforced by the transferee at his own cost.

The wharves and levees, which constitute the subject-matter of this arrangement, consisted of artificial improvements, made at the expense of the city, by grading, and piling securely driven, fastened, and covered with plank flooring, so as to furnish safe and convenient landings and moorings for water-craft, and places for loading and unloading their cargoes. Provision was made not only for keeping in repair the existing works and structures, but the transferee of the revenues was bound to build additional new wharves in certain specified districts of the city, if required to do so, not to exceed a named sum per annum; but if new wharves should be required in other districts by the city council at their own or the request of any other person, the party so desiring them should be bound to pay for the cost thereof, and should be entitled to receive the revenues derived from such wharves during the term of contract with the transferee, unless sooner reimbursed.

The claim of Ellerman is, that the administration of the wharves and levees within the city limits is intrusted by law to municipal government; that with this administration is coupled a franchise that the city might charge and receive a reasonable remuneration for the expense of the facilities afforded to commerce; that under this franchise the city expended out of the revenues of the corporation very large sums on the wharves and levees in permanent works and improvements, for the benefit of commerce; that, in consequence, the city had a vested right in the franchise and the revenues legitimately derived from these expenditures, of which it could not be divested by an act of the legislature, and that the appellee, by virtue of his contract, is subrogated during its term to the rights of the city.

He further claims that it is a violation of these rights for the defendants to permit the use and employment of their property as a wharf, and to charge and receive wharfage for such use, by and from persons not engaged in conducting the proper business of the railroad company, thus opening a rival wharf business in competition with the city of New Orleans and the appellee as its lessee; and that if the joint resolution of March 6, 1869, must be construed so as to confer upon the railroad company any such authority it is null and void, because contrary to that provision of the Constitution of the United States which forbids the taking of private property without due process of law.

It is not claimed that the city has ever used as a public wharf

the premises so occupied by the appellants, or made any expenditures for works and constructions upon them; and it is admitted that all expenditures of that description which have been made thereon have been at the cost of the railroad company.

A decree was rendered in the Circuit Court in favor of the appellees, granting the relief prayed for, to review which this appeal is prosecuted.

In the opinion of the circuit judge, 2 Wood's C. C. Rep., 120, the case turned upon the construction to be given to the joint resolution of March 6, 1869; and being of opinion, upon the authority of the decisions of the Supreme Court of Louisiana, in the case of *The City of New Orleans v. The New Orleans, Mobile and Chattanooga R. R. Co.*, 27 La. Ann. 414, that this resolution conferred upon the railroad company no right to charge wharfage dues against vessels landing at said wharf which were in no way connected with the business of the railroad company, and no right to maintain a free wharf for such vessels, it was assumed that the appellee had such an interest in the questions as qualified him to maintain this suit, and entitled him to the relief prayed for.

The case of *The City of New Orleans v. The New Orleans, Mobile and Chattanooga R. R. Co.*, supra, was a suit brought by the city against the railroad company to recover a sum of money for levee dues, charged against the defendant for barges and flatboats belonging to the company and lying at this wharf, and which were used in its business.

The Supreme Court of the State in that case decided that the joint resolution was not void for either of the reasons urged. It said: "The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. C. C., 453, 455, 458. The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has long been settled. 5 Ann., 661; 15 Ann., 577; 22 Ann., 545; 6 N. Y., 523; 26 N. Y., 287. In the case now under consideration the State granted the right to the riparian owner. This is permissible. 1 Black, 1. Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes, to wit, to facilitate the transaction of its business with the public. It was the control by the legislature of a public servitude."

The extent of the rights of the railroad company under the joint resolution—whether they were limited to the use of the wharf for railroad purposes merely, or embraced its use for all purposes—was a point not involved in the case then before that court, and was not decided by it either in express terms or by any fair inference. What that decision did affirm, however, was that the disposal of the public right in the premises, as a wharf, was in the State, to the exclusion of the city, so that if the joint resolution had

been a cession to a natural person, as riparian proprietor, to improve the premises as a landing place for water-craft, and for loading and unloading cargoes, by building levees and wharves, at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming in its right. And construing the grant to the railroad company as limiting the use of the property as a wharf to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the railroad company should have the right to exclude all other uses; and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

Neither would this be in derogation of any vested right of the city. Whatever powers the municipal body rightfully enjoys over the subject is derived from the legislature of the State. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation, which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river. *Cannon v. New Orleans*, 20 Wall. 577.

And while it may be true, as was decided by the Supreme Court of Louisiana in *Ellerman v. McMains*, 30 La. Ann. 190, that the city cannot lawfully be required to permit the use of its wharves, without compensation, on the ground that they are private property, it is equally true, as was decided by the same court in *The City of New Orleans v. Wilmot*, 31 La. Ann. 65, that the city cannot forbid any water-craft from using the banks of the navigable waters of the State for purposes of navigation and commerce, and cannot compel them to pay to it wharfage, except as compensation for the use of wharves of which it is the proprietor.

The rights of the city in respect to this controversy would seem, then, to be reduced to that of building levees and wharves on the banks of the river within its corporate limits, for the public utility, with the exceptions established by paramount law, and collecting reasonable wharfage for the actual use of such structures. Its right to build a wharf upon the land of the railroad company, the appellant, we have seen, is excluded by the terms of the joint resolution of March 6, 1869, according to its narrowest construction.

The sole remaining question, then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the railroad company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in

preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, ~~not upon the claim~~ that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the railroad company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the appellant, although the railroad company may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character, as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of its rights. The company is not shown to owe him any duty which it has not performed.

This was the principle on which this court proceeded in the case of *The City of Georgetown v. The Alexandria Canal Co.*, 12 Peters, 91. It is applied in *Mayor, etc., of Liverpool v. Chorley Waterworks Co.*, 2 DeG. M. & G. 852; *Stockport District Waterworks v. Mayor, etc., of Manchester*, 9 Jur. N. S. 266; *Pudaley Coal Gas Co. v. Corp. of Bradford*, L. R. 15 Eq. 167.

On this ground it is our opinion that the appellee failed to allege and show any right to maintain his bill, which should, therefore, have been dismissed. The decree is accordingly reversed, with directions to dismiss the bill; and it is so ordered.

THE DETROIT AND BAY CITY R. R. CO.

v.

WILLIAM C. BUSCH.

(48 *Michigan Reports*, 571. June 9, 1880.)

Where ties were taken and used by the sub-contractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, cannot bring trover against the company as for their conversion.

ERROR to Saginaw.

Trover. Defendant brings error.

Benton Hanchett and G. M. Stark for plaintiff in error. Trover will not lie against a railroad company for ties placed in the bed of the roadway before the road was delivered to the company. *Woodruff v. Adams*, 37 Conn. 233; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Strickland v. Parker*, 54 Me. 263; *Cooley on Torts*, 55.

John A. Edget for defendant in error. The annexation of chattels to the realty by a wrong-doer will not deprive the owner of his remedy in trover. *Cochran v. Flint*, 57 N. H. 514; *Shoemaker v. Simpson*, 16 Kan. 43; *Ford v. Cobb*, 20 N. Y. 346; *Railroad Company v. Kaulbrumer*, 59 Ill. 152; if they are so firmly annexed that they cannot be removed without remedy, the owner cannot retake them, but may recover their value in their original condition. *Wetherbee v. Green*, 22 Mich. 311; *Winchester v. Craig*, 33 Mich. 205; *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332; the intent to annex them permanently to the freehold must be that of the owner, to change their character. *D'Eyncourt v. Gregory*, L. R. 3 Eq. Cas. 397; *Reese v. Jared*, 15 Ind. 142; *Crippen v. Morrison*, 13 Mich. 34; *Wheeler v. Bedell*, 40 Mich. 673.

CAMPBELL, J.—Busch sued plaintiff in error in trover for the conversion of a number of railroad ties. The case he made out on his own behalf was that parties employed as sub-contractors under Walton & Lacy, contractors to build the Caro branch of the Detroit and Bay City R. R., used 251 ties owned by Busch, and put them here and there among the other ties used in forming the superstructure of the railway, spiking rails to them in the usual manner. He gave testimony tending to show that the ties could after that have been identified, and that they could be removed and others substituted without damage to the road. The ties, as he claimed, were used before June 12, 1878, and about that time he "notified the president of defendants of the fact." The road was not

delivered up to the company complete and ballasted until October or November, 1878, although used somewhat earlier. This suit was commenced in January, 1879. Before its commencement Busch made a demand of the ties on the president of the company.

Under the charge of the court below he was allowed to recover the value of the ties, the court holding that their use by the company after demand was a conversion.

If Busch had brought replevin when he discovered the disposition made of his ties without his consent, and before the delivery of the road to the company, the question whether he could have removed them might perhaps stand on a somewhat different ground from the present suit. Here, as he shows, he knew of the use of the ties before the railway had passed from the contractors to the company, and knew that they were where the company when it received them would receive them as realty. He knew also that the company was not the party that converted or was to convert them into realty. Whatever might have been his original possessory remedy, he has by this action sued for the conversion. The only conversion took place before the company had any control over the property. Receiving it as realty, it cannot be held that a subsequent neglect or refusal to detach it is a conversion. Having deliberately chosen to wait until the property not only changed custody but was also annexed still more firmly by ballasting, he cannot now treat as personalty in the hands of the railroad company, converted by a mere failure to give it up on demand, what became to his knowledge a part of realty in the hands of the contractors, against whom he had a remedy for the only conversion that ever took place. *Morrison v. Berry*, 42 Mich. 389; *Peirce v. Goddard*, 22 Pick, 559; *Fryatt v. Sullivan Company*, 5 Hill 116; 7 Hill, 529; *Cooley on Torts*, 55.

The court should have directed that Busch could not recover. The judgment must be reversed with costs, and a new trial granted. The other Justices concurred.

STATE OF MINNESOTA

v.

KILTY.

(Advance Case, Minnesota. November 14, 1881.)

If one wilfully places on a railroad track, used by and on which engines and carriages conveying persons are likely to pass, any obstruction likely to produce disaster to such engines or carriages, and to endanger the safety of the persons conveyed thereon, he is guilty of the offence described in section 63, c. 94, Gen. St. 1878, though no engine or carriage be actually stopped or impeded by such obstruction.

CERTIFIED from District Court, County of Washington.

W. J. Hahn, Atty. Gen., for the State. L. E. Thompson and C. D. O'Brien, for defendant.

GILFILLAN, C. J.—The defendant was indicted under section 63, c. 94, Gen. St. 1878, which reads: "Whoever shall wilfully obstruct any engine or carriage passing upon any railroad so as to endanger the safety of any person conveyed in or upon the same, or shall assist or aid therein, shall be punished by imprisonment in the State Prison not exceeding 20 years." The question here is, what does the statute mean by the words "obstruct any engine or carriage passing upon any railroad"? Does the word "obstruct" here used mean an actual stoppage or impeding the passage of such engine or carriage by its coming in collision with some obstacle placed in its way? Or is the act, which the statute declares criminal, complete when an obstacle is placed on a railway in such a manner that any train in passing may strike it, and of such a character that the safety of persons conveyed will be endangered if a train come in collision with it? The statutes of other States, on this subject, differ from ours in language so much that decisions upon them are hardly applicable. The statute most nearly like this in terms was section 15, c. 97, 3 and 4 Vict., which read: "Any person who shall wilfully do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, shall be guilty," etc.

In *Regina v. Bradford*, Bell's Crown Cases, 268, where the defendants were indicted under that statute, they had placed across the railway a truck in such a manner that it might obstruct the passage of trains, and endanger the safety of persons conveyed on them, but it was discovered and removed in time to prevent any collision. It was contended that to constitute the crime some

engine or carriage must be absolutely obstructed. But the court held otherwise, and that to put obstructions on the railway in such manner as was likely to cause disaster to engines and carriages using it, and endanger the safety of those conveyed, was within the statute, although no disaster actually resulted. When the character of disaster such as the statute aims to prevent, and the utter depravity evinced by acts likely to produce such disasters are considered, this would seem to be the proper construction of such a statute. Certainly the moral guilt of one who places on a railway obstructions likely to produce such disaster is not lessened by the fact that through accident, or vigilance of those in charge of the railway or its train, the disaster is averted. It is the character of the act, and not the actual consequence of it, which fixes its criminality. When the person has done the act from which, but for the interposition of some other agency than his, disaster is likely to follow, his crime, in morals, at any rate is complete.

The obstructing declared criminal is not such only as causes injury to persons conveyed, but it is such as causes danger to them. If injury to such persons were necessary to constitute the crime, then probably an actual collision might be necessary. But, as it is, the putting such persons in danger by the obstructing which the statute aims to prevent, an actual collision, or even a near approach to it, is not a necessary ingredient of the crime, if the danger to such persons may exist without it. Whenever a train sets out to pass over a railway, danger to it and to the persons conveyed exists from the existence on the track over which it must pass of any obstacle sufficient to produce a violent collision. The danger may be more or less remote as the train is more or less distant from the obstacle, as the probability is greater or less that the obstacle may be removed in time; but, if it exists, the safety of the persons conveyed is to a greater or less degree endangered. It is the fact that their safety is thus endangered, and not the degree of danger, which is a constituent of the offence.

So we hold that where one wilfully places on a railroad track, used by and on which engines and carriages conveying persons are likely to pass, any obstruction likely to produce disaster to such engines or carriages, and to endanger the safety of the persons conveyed, he is guilty under section 63. The court below was correct in refusing defendant's request for instructions, and in the instructions which it gave.

MITCHELL, J., dissenting. I think there must have been an actual stopping or impeding of the engine or carriage in order to constitute the offence created by section 63.

STATE

v.

ROBERT BOYD.

(86 North Carolina Reports, 634.)

An indictment for violating the act of 1877, ch. 4, in shooting or throwing a missile at a railroad car or locomotive, which fails to charge that the same was in actual motion or stopped for a temporary purpose, is defective. (*State v. Hinson*, 82 N. C., 597, cited and approved.)

INDICTMENT for a misdemeanor, tried at Fall Term, 1881, of Vance Superior Court, before Gudger, J.

The defendant is indicted for violating the act of 1877, ch. 4—if any person shall cast, or throw, or shoot any stone, rock, bullet, shot, pellet, or other missile, at, against, or into any railroad car, locomotive or train, while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, with intent to injure said car or locomotive, or any person therein or thereon, the person so offending shall be guilty of a misdemeanor, etc.—and the bill charges “that he unlawfully and wilfully did cast, throw and shoot at, against and into a certain railroad car, the property of the Raleigh & Gaston Railroad Company, then and there being, a certain missile, to wit, a stone, with intent,” etc., as alleged in one count to injure the said railroad car; and in the other, some person then in said railroad car. After conviction a motion was made in arrest of judgment, which being denied, and judgment pronounced, the defendant appealed.

Attorney General, for the State.

No counsel for the defendant.

SMITH, C. J.—We think the objection well taken to the sufficiency of the bill, and that it fails to charge the criminal act intended by the statute which creates the offence. The manifest purpose of the enactment, as must be inferred from its structure, is to protect railroad trains, and the locomotive and cars which make them up, from wanton aggression and violence, and to secure the safety of persons upon them, while the trains are making their passage from one point to another upon the road, and are in actual use by the company. This is apparent from the qualifying words, “while in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose”—evidently contemplating the two conditions of the train during its

passage over the track, when in actual motion or stopped for a temporary purpose during its progress.

The indictment is too general in its terms, and its allegations would be supported by proof that the injuring was done to a car not in use, and off the track, or even within the car-house. The statute does not make such an act (injurious to private property only and to be redressed by suit) a public offence, and subjecting the offender to punishment in the State's Prison.

The defect in the charge is, that it does not specify the alleged violence as done to the car or locomotive of a train while in the course of running over the road, and either as then in actual motion or at temporary rest, and thus exclude cases not within the purview of the statute. The only indictment under it, which has been before us, alleged the car to be on the railroad track and in motion, when shot at by the accused. *State v. Hinson*, 82 N. C. 597.

There is error, and judgment must be arrested.

Error. Judgment arrested.

POWELL and others

v.

THE STATE.

(52 Wisconsin Reports, 217. May 10, 1881.)

Where one enters a moving car in one county, with intent to commit a larceny in such car, and with the same intent continues in the car until it passes into another county, and there commits the intended larceny, there is in law a fresh entry in the latter county, and the offence is indictable therein under the statute.

ERROR to the Circuit Court for Columbia County.

An information was filed by the district attorney in said court against James H. Powell and four others, charging that they "did feloniously break and enter in the night-time a certain railroad freight car then and there being the property of the Chicago, Milwaukee & St. Paul Railway Company, with intent feloniously to steal, take and carry away the goods and chattels of said company, then and there being in said car." There was a verdict of guilty against all the defendants; a motion in arrest of judgment was denied; and, judgment having been rendered pursuant to the verdict, the defendants sued out a writ of error to reverse such judgment.

The cause was submitted on the brief of G. J. Cox for the plaintiffs in error, and that of H. W. Chynoweth, Assistant Attorney General, for the State.

For the plaintiffs in error it was argued, 1. That unless the crime was committed in the county of Columbia, the court had no jurisdiction. Const. of Wis., art. I. sec. 7; R. S., sec. 4679. The statute under which the accused were convicted (R. S., sec. 4409) does not make being in the car a crime, but punishes only the entry with felonious intent. When the prisoners entered the car at Watertown, the crime, if any, was complete; and they could be held to trial only in the county where such entry was made. A thief may be convicted of larceny in any county to which he removes the goods; but here the goods remained in possession of the railroad company, and were taken by it into Columbia county. The statute does not make being in the car a fresh entry; and it should be strictly construed. *State v. Welch*, 37 Wis. 200. 2. That the intent to commit the crime of larceny when entering the car constitutes the crime, and if the accused entered the car for any other purpose, they could not be convicted under the statute (*McCourt v. The People*, 64 N. Y. 583; *State v. Ryan*, 12 Nev. 401; S. C., 28 Am. R. 862); that the felonious intent should be established beyond reasonable doubt (*State v. Bloodow*, 45 Wis. 279); and that the evidence of such intent in this case was insufficient.

BY THE COURT.—1. The conviction of the plaintiffs in error of the crime charged in the information cannot be disturbed, for want of testimony tending to show the felonious intent charged therein. There was sufficient proof of such intent to send that question to the jury.

2. Conceding that the plaintiffs in error entered the car in the county of Jefferson, if, with the same felonious intent, they continued therein until the car passed into the county of Columbia, the offence charged was committed in the latter as well as in the former county. The felonious intent not being abandoned, it is a fresh entry in each county into which the car was taken while they so remained in the car. This is held in analogy to the common-law rule that where a person steals goods in one county and carries them into another county, the felonious intent continuing, it is a fresh larceny in such other county. 1 Bish. Cr. Pr., § 59. There seems to be no distinction in principle between the two cases. We are referred to no direct authority on the precise question here, and probably there is none, as the offence is a statutory one, and such statutes are of comparatively recent origin. Unless we apply to the case the principle above stated, it would be difficult to convict any one for breaking or entering a moving car with intent to commit a felony.

This view sustains the instructions which the judge gave to the jury.

The judgment is affirmed.

EICHELBURGER

v.

PITTSBURG, CINN. AND ST. L. R. W. Co.

(Advance Case, Ohio. 1882.)

A railroad company, the lines of which extended through Ohio and West Virginia owed one month's wages to a brakeman resident in Ohio. By the laws of Ohio one month's wages are exempt from attachment and execution. A creditor of the brakeman instituted attachment proceedings against him in West Virginia, attaching the wages due by the company. The brakeman had notice of the proceedings, but did not appear, and the company, under order of the West Virginia court, paid into court the amount in its hands as satisfaction of the debt. An assignor of the brakeman subsequently brought suit against the company, in Ohio, for the amount of the wages due. *Held*, that the exemption law of Ohio did not extend in this case to West Virginia; that there was no presumption that a similar law existed in such state; that even if the brakeman could have set up such exemption in the West Virginia court, it did not appear that the company defendant could have done so; that the company did not appear to have neglected any duty incumbent upon it; that its payment of the amount of the wages due operated as a discharge, and that therefore plaintiff was not entitled to recover.

The statute law of another state is a fact which must be proved like any other fact. In the absence of anything to the contrary, the presumption is that the common law obtains, and not legislation, similar to that of the state wherein the question arises.

WALKER, J.—The appellant's assignor, a resident of this state, was in the employment of the appellee, as brakeman, on its line of road. At a time when the appellee was indebted to such employee for one month's wages for services, a suit was commenced in West Virginia by the assignee of a creditor of the appellant's assignor in attachment, and the appellee was served with a writ of garnishment to answer as to its indebtedness to such employee. Service was had on the appellee in that jurisdiction, its road extending into that state. The employee had notice of the pendency of such proceedings. Under our statute one month's wages of such employee are exempt from legal process. The employee did not appear to the action. The appellee was ordered by the court in West Va. to pay said money into court in satisfaction of the claim of the attaching creditor; and, in obedience to such order the appellee paid the sum into court, and now pleads such adjudication in defence to an action by the assignee of the claim (subsequently assigned) of its employee for the wages aforesaid. The court in special term held the defence good that the appellee could not be held to respond a second time for such debt. Was the ruling right is the only question presented here. Under the facts in this case, I think the judgment

ought to be sustained. The authorities do not go to the extent that a garnishee is liable a second time for such indebtedness, if the employee had notice and an opportunity to defend. The cases relied on in this appeal are *Pierce v. Chicago and N. W. Ry. Co.*, in 36 Wis. 285, and the *Chicago and Alton Ry. Co. v. Ragland*, 84 Ill. 375. The latter case can have no application here, as the attachment proceedings in that case were begun and concluded within the state. The case in 36 Wis. would seem to support the view of the appellant, holding that in such case the garnishee should have claimed the exemption for the original debtor, or at least have give him notice and requested him to defend, and for that purpose the presumption was that other states had a like law on the subject. The reason for the rule that notice should be given to the employee, and an opportunity to defend seems to be given in *Bushnell v. Allen*, 48 Wis. 467.

Where the court says of the above language used in 36 Wis., that "these observations were made with reference to the former law, which did not require the garnishee summons to be served on the defendant in the main action." In such case it will be seen that the defendant in the attachment might not know that the debt due him was attempted to be appropriated by a creditor, and might not be able to defend except by the use of the name of the garnishee.

Under such circumstances it might well be considered the duty of the garnishee to notify the attachment defendant of the garnishee proceedings, and thereby give him an opportunity to defend, and for failing to do so, and for failing to make an effort to prevent an unlawful appropriation of the debt due from such garnishee by an attaching creditor, such garnishee might be compelled to pay the debt a second time, without its being reasonably claimed to be a great hardship. But in this case the attachment defendant had notice of the pendency of the suit given him by the appellee as soon as it had notice, and had the opportunity to defend, and failing to do so the order was made for the payment by the garnishee.

Let it be considered the duty of the garnishee to use all legal means to prevent the appropriation of its debt in payment of the plaintiff's claim in attachment, and to make every defence there to which the attachment defendant could have done, and even claimed the exemption for him on his failing to do so, how does the case stand?

Before the garnishee should be charged a second time with the debt ought it not be made to appear that such garnishee might have made a successful defence to the action against it, and in this case that the exemption could have been made available to defeat the order made. I think such requirements should be made before a second application of the same debt could be had.

If the Wisconsin case is deemed an authority against the view,

it may be said that the case has had the support of no authority, and it cites none that sustains its position; and if the conclusion reached by the court can only be supported by the reason given, it must fail as an authority in this state. It is decided on the theory and presumption that a sister state has the same law in relation to exemption as its own, announcing it as a rule that in the absence of any evidence to the contrary that the court will presume that a sister state has a statute the same in its terms, and giving the right and remedies that are conferred by its own legislation. No such rule prevails in this state. Under our decision we are not at liberty to presume that West Va. has a statute providing that a non-resident of that state may claim as exempt from legal process in its jurisdiction, a month's wages in all cases where such debt is due from a corporation to one of its employees. The rule here is that the statute law of a sister state is a fact that must be proved like any other fact. And that in the absence of anything to the contrary, that the common law prevails in a sister state, and not that kindred legislation exists. The last reported expression of our Supreme Court on that question is in the case of *Robards v. Marley*, 80 Ind. 185. See also *Buckles v. Ellers*, 72 Ind. 22, and cases cited in *Robards v. Marley*.

The Wisconsin case, as I have said, has been followed nowhere, so far as I have been able to ascertain, but has been expressly disapproved by some of the courts in the different states, and unfavorably criticised by text-writers, and its authority denied. *Moore v. Chicago Ry. Co.*, 43 Iowa, 385. *Freeman on Executions*, sec. 209 and notes; *Thompson on Homesteads and Exemptions*, sec. 866, 2 Cent. Law. J. 374, 378, 447.

"The operation of exemption laws is restricted to the state in which they are enacted. They do not constitute a part of the contract between the debtor and creditor to the extent that the former may invoke them wherever he may choose to go." *Freeman on Ex.*, sec. 209, and authorities there cited.

My conclusion is that the law of this state exempting the wages of the appellant's assignor from legal process has no extra territorial force, that as there is no evidence of the existence of such a law in West Va. there is no presumption that a like law exists there; that even if the appellee could claim the exemption for the employee, it does not in any way appear that it would have availed as a defence; that the law does not require greater effort on the part of the appellee to save the rights of its employee than it requires of him to save his own. And as it is not shown that any injury has been done by any neglect of a duty which the law enjoins on the appellee, the appropriation of the debt in West Va., by order of a court of competent jurisdiction, is a discharge of the claim of his assignee in this case, and must result in an affirmance of the judgment discharging the appellee from further liability.

Judgment affirmed.

WILSON

v.

SOUTHERN PACIFIC R. R. Co.

(Advance Case, California. 1882.)

Where there is evidence to sustain a verdict in the court below, said verdict is conclusive and cannot be reviewed on appeal.

In an action against a warehouseman proof of demand and refusal to deliver property stored with him constitutes prima facie evidence of negligence. If it appears, however, that the property, when demanded, was consumed by fire, the burden of proof is on the bailor to show that the fire resulted from some negligence or want of care on the part of the warehouseman.

Direct and positive evidence of negligence as a fact is not in such case required, any circumstances which tend to prove it or from which it may be reasonably inferred are sufficient.

In an action for negligence it is error for the court to award a nonsuit unless there is no evidence at all of negligence or a mere scintilla, wholly insufficient for the consideration of the jury, or unless the facts are agreed upon or admitted, and in the judgment of the court are insufficient to constitute a cause of action.

In an action against a railroad company to recover damages for the loss of certain bales of wool destroyed by fire while in the defendant's warehouse, plaintiff proved that in the evening the warehouse keeper took a lamp into a small wooden room adjoining the office, made his toilet, and afterwards took the lamp with him into the warehouse, blew it out and locked the place up. Soon after the fire in question took place originating near the spot where the lamp had been left. *Held*, that there was evidence to go to the jury that the fire had been occasioned by the careless or negligent use or extinguishment of the lamp.

It was not error in the above case to refuse to strike out that clause of the complaint which alleged that defendant owned and operated a railroad. There was nothing in this to irritate or excite the prejudices of the jury against the defendant.

McKEE, J.—The appeal in this case comes from a judgment and order denying the motion of appellant for a new trial in an action to recover damages for the destruction of certain property of the respondent, by a fire caused, as alleged, by the negligence of the appellant and its employees in conducting and managing its warehouse in which the property had been stored.

The case was tried by the court with a jury, and a verdict was rendered against the appellant. If there was any evidence to warrant the verdict we cannot review it on appeal. It is conclusive upon us, not only on the question of negligence, but upon all the allegations in the complaint material to recovery in the action. (*Algier v. Steamer Maria*, 14 Cal. 172; *Brown v. Brown*, 41 Id. 88; *Trenor v. C. P. R. R. Co.*, 50 Id. 232.) It is, however, contended

that there was no evidence to sustain the verdict, and that the court below erred in denying a motion for a nonsuit.

It was proved on the trial that the respondent had stored in the appellant's warehouse sixty-four bales of wool of a certain value per pound, which on demand and tender of the storage due upon it, the appellant refused to deliver to the respondent, assigning as a reason, that the warehouse and all it contained, except about three bales, which were returned to him, had been consumed by fire.

A *prima facie* case of negligence is made out against a warehouseman, who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone the burden is on him to account for the property; otherwise he shall be deemed to have converted it to his own use. But it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. (*Harris v. Packwood*, 3 Taunt. 264; *Beardslee v. Richardson*, 11 Wend. 26; *Brown v. Johnson*, 29 Tex. 43; *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y. 271; *Jackson v. Sac. Val. R. R. Co.*, 23 Cal. 269.)

The negligence of the appellant, as the proximate cause of the loss of the property by fire, thus became the essential fact to recovery; and the burden of proof was upon the plaintiff in the action. It was incumbent on him to prove that the defendant had by some act of omission, violated some duty, by reason of which the fire originated; or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit the fire by which the property was destroyed.

Direct and positive evidence of negligence as a fact is not required. Any circumstances which tend to prove it, or from which it may be reasonably inferred are sufficient. And when such evidence has been given on the trial of an action, it is not for the court to usurp the disposition of the fact by ordering a nonsuit. Such an order should not be made unless there is no evidence at all, or a mere scintilla of evidence wholly insufficient for the consideration of the jury, or unless the facts are agreed upon, or admitted, and in the judgment of the court, are insufficient to constitute a cause of action. Upon facts admitted, or proved and found, it is the duty of the court to say what the law applicable to them is. But where negligence, as the essential fact in the case, is disputed, and the evidence of it is conflicting, or consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine, under instructions by the court, whether the evidence establishes it as the proximate cause of the injury complained of.

Applying these principles to the record before us, we find there was no error in sending the case to the jury. For the evidence upon which the plaintiff rested went to show that the building, up to the

time of the fire, had been used by the defendant as a warehouse and railroad depot, and was in charge of two employes of the defendant, one of whom was its local agent, and the other its warehouse keeper. In the warehouse, cut off from the northern end of the building, there was, adjoining the office and sitting-room of the railroad depot, a bed-room in which the keeper slept every night. The room was about fourteen feet square; its walls were constructed of upright redwood boards about fourteen feet high, which were lined with cloth and paper. It was occupied with the bed and furniture of the keeper, and on the walls hung his clothes and files of newspapers. On a shelf against one of the partition walls in the warehouse were kept several lamps trimmed and ready for use. On the evening of the fire, the local agent had left the warehouse in charge of the keeper, whose duty it was to "shut up the doors of the warehouse and fasten it up for the night." Having performed that duty the keeper himself went to supper, and after supper returned to the warehouse. When he returned he went into the office, lit one of the lamps, took it into his bed-room and sat it down on a little stand at the head of his bed, between the window and bed, and about three feet from the window. He remained while he changed his clothes and dressed himself for the purpose of going out to visit some friends. Having finished his toilet, he locked up and left the warehouse.

What he did with the lighted lamp before leaving is thus stated, by himself: "After I had partially changed my clothing, I returned to the office and remained there perhaps half an hour or three-quarters of an hour. * * * I think I extinguished my lamp and went away. * * * No lamp was burning when I left the depot. When I came out of the office into the sitting room I turned down the lamp, blew it out, and sat it on a little shelf within the office, to the left of the office door. * * * I looked at it, saw it was out, and left it." About an hour or so after he had gone the warehouse was afire.

The first person to observe the fire was the proprietor of a hotel situate about 300 feet from the warehouse. Seated in the front office of the hotel, looking through the glass window of the door of the office, his attention was arrested by a sudden flash of light, which momentarily lighted up the warehouse and then went out, leaving the warehouse enveloped in smoke. Remarking to some one near him that the warehouse was afire, he ran out and gave the alarm. Those whom the fire alarm drew first to the burning building discovered, as they ran to it, the fire dropping from about the center of the warehouse, very near to the locality of the bed-room and office; and on reaching the spot, they kicked in the bed-room and office windows, and saw the office filled with smoke and the bed-room afire—the flames running up the partition walls and over the bed.

There is no doubt that the warehouse keeper had the right to light the lamp and use it in the bed-room and office before leaving the warehouse; and it was reasonable to infer that a careful use of the lamp would not have set fire to the warehouse. But it would also be a reasonable inference that a negligent use of the lamp might have occasioned the fire; and the question arose, whether under all the circumstances in connection with the use of the lamp the warehouse keeper was careless in using the lamp while in the bed-room and office, or in the extinguishment of it before he left the warehouse. If he was careless in its use or extinguishment, and that carelessness caused the lamp to explode or otherwise ignite any inflammable matter near to it which fired the building, the fire would be attributable to the negligence of the defendant.

Now, it was an indisputable fact that the warehouse was fired from some cause, it was also indisputable that the fire occurred while the warehouse, in which the keeper had been using a lighted lamp, was under the lock and key of the defendant, and soon after the warehouse had been closed by the keeper for the night; and (as the evidence tended to show) the fire originated at, or "very near" the bed-room and office in the warehouse in which the lamp had been used. It is manifest that these facts and circumstances point, somewhat at least, in the direction of the lamp as the cause of the fire. And even if inferences to be drawn from them as to the origin of the fire were uncertain and controvertible, yet as differences of opinion upon the subject might reasonably exist in the minds of intelligent men, the facts and circumstances were for the consideration of the jury and not for the court. It was for the jury to determine from them, in connection with the other circumstances in the case, whether the warehouse keeper used due care in respect to the lamp, its use and extinguishment, and whether the fire originated in his carelessness or from accidental causes—such as spontaneous combustion of the wool in the warehouse. Defendant's counsel attributed the fire to that cause. But there seems to be nothing in the evidence in the record to sustain his theory. And however that may be, there was in the evidence of the case sufficient to warrant the court in submitting it to the consideration of the jury. There was, therefore, no error in denying the motion for a nonsuit, nor did the court err in overruling objections, which were made at the trial, to the admission of evidence which tended to show the condition of the building at the time of the fire, and all the facts and circumstances connected with the fire. These were properly allowed to go to the jury for their consideration upon the issue submitted to them.

The court may have erred in denying the defendant's motion to strike out the averment in the complaint, that "the defendant was the owner of and operated a railroad in the county," etc., but it was error without injury; for the fact that the defendant was in pos-

sion of the building, and used it as a warehouse and depot in connection with its railroad, was proved in the case without objection; and it was inseparably connected with the evidence as to the use of the warehouse. We cannot, therefore, perceive how the averment of the fact in the complaint tended to "irritate and excite the prejudices of the jury against the defendant." There is nothing in the record suggestive even of the existence of such prejudices; and nothing to overcome the presumption that the verdict was a fair expression of judicial opinion warranted by the evidence submitted to the jury for their consideration.

Some parts of the charge of the court may be subject to verbal criticisms, but we see nothing in it inharmonious or misleading. Taken as a whole it fairly submitted the case to the jury; and under such circumstances the verdict will not be disturbed for mere inaccuracies or errors from which no possible injury could have resulted to the defendant.

The newly discovered evidence upon which the defendant asked for a new trial was cumulative.

We cannot say that the damages given by the jury are excessive or appear to have been given under the influence of passion or prejudice.

No error prejudicial to the defendant appearing in the record, the judgment and order appealed from are affirmed.

We concur:

ROSS, J.,
SHARPSTEIN, J.,
MYRICK, J.

I concur in the judgment:

McKINSTRY, J.

See same case reported on a former hearing, 7 Am. & Eng. R. R. Cas., 400 and note.

JAMES KEETER

v.

WILMINGTON & WELDON R. R. Co.

(86 North Carolina Reports, 346. 1882.)

A railroad company is not relieved of liability to the penalty of \$25 per day, under the act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient number of cars.

By the words "five days," the act means five full running days, including Sunday whenever it intervenes.

The company would not incur the penalty until the full expiration of the sixth day after receipt of the goods—the law not regarding the fraction of a day in the enforcement of a penal statute.

(*Branch v. R. R. Co.* 77 N. C. 347, cited and approved.)

Civil action tried at Fall Term, 1881, of Halifax Superior Court, upon the following case agreed, before Gilmer, J.

On Friday, the sixth day of the week, being the 24th day of December, 1880, the plaintiff delivered at the depot of the defendant, in the town of Halifax, one bale of cotton for shipment to W. W. Gwathmey & Co., merchants in Norfolk, Virginia, which bale of cotton was so received by the defendant for shipment as aforesaid. Owing to the large accumulation of freight at its depot at Halifax, and the inability of the defendant company to provide the necessary number of cars for shipment of freight, the said bale of cotton was detained at the depot until Thursday, the 30th day of December, 1880, when it was taken from the possession of this defendant by the sheriff of Halifax county, under and by virtue of an order of John O'Brien, a justice of the peace of the county, made in a certain civil action pending before him, wherein one G. W. Bryan was plaintiff, and the plaintiff in this action was defendant. Between the 24th and the 30th day of December, 1880, a Sunday intervened. Upon this agreed state of facts the court rendered judgment in favor of the plaintiff, and the defendant appealed.

Messrs. Mullen & Moore, for plaintiff.

Mr. Spier Whitaker, for defendant.

ASHE, J.—The plaintiff sued for the penalty of twenty-five dollars, incurred by the defendant under the act of 1874–75, ch. 240, for allowing a bale of cotton belonging to plaintiff to remain unshipped for one day over five days, from the date of the delivery for shipment. The action is brought under the second section of the act, which provides, that "it shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment, to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper; and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same." The cotton was delivered on Friday, and remained unshipped until the next Thursday.

The defendant company contended that it was not liable to the penalty, upon two grounds: First, because owing to the large accumulation of freight at its depot in the town of Halifax, and its inability to procure the necessary number of cars for the shipment of freight; and secondly, because the legislature, by the act

of 1879, ch. 197 and ch. 203, prohibited the cars running on Sunday, the effect of which was to eliminate Sunday from the five days, when it intervened, so that it was not to be counted in the computation of the time limited for shipment.

The excuse offered for the delay in the first exception is inadmissible. In *Branch v. R. R. Co.*, 77 N. C. 347, which was an action like this, to recover the penalty under the same section of the act of 1874-75, where the same excuse was set up in defence to the action, it was held that the accumulation of freight beyond the ability of the company to transport the freight delivered, within the five days after delivery, was no excuse, for it was the duty of the company to provide cars for the transportation of all the freight delivered. And it was also decided in that case, that by the words "five days," the act meant five full running days, including Sunday whenever it intervened. This construction of the act makes it unnecessary for us to decide the disputed question whether the day of delivery is to be included or excluded.

In our case the delivery for shipment having been made on Friday, the 24th of December, and the five days having ended at 12 o'clock on the night of the Wednesday following, and the seizure having taken place on the next day, Thursday, the 30th day of the same month, the question is, did the defendant incur the penalty imposed for one day's delay.

The seizure on Thursday is the same as if the bale of cotton had been shipped on that day. The act makes it unlawful for any railroad company to allow freight to remain unshipped for more than five days, and any company violating the act shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped. Giving then the defendant the full five days, including Sunday, the cotton having been delivered on Friday, the full five days ended on Wednesday. The seizure was made the next day, at what hour we are not informed, but that is immaterial, as the law will not regard the fraction of a day in the enforcement of a penal statute, which is to be liberally construed in favor of him upon whom the penalty is imposed. The defendant is liable to the penalty for the delay of each day—that means each whole day—and the legal day is twenty-four hours. The defendant then would not incur the penalty until the full expiration of the sixth day after the delivery.

This is the construction of the act given by the court in *Branch v. R. R. Co.* supra. There the delivery of the cotton was on the 10th day of October, and the shipment was on the 19th of the same month. The court say: "The full five days expired on Sunday, the 15th day of October, and the first penalty was incurred on Monday, the 16th, the second on the 17th, the third on the 18th. On Thursday, the 19th, the cotton was shipped. The day of shipping should not be counted, because no penalty is incurred by

any delay of a fraction of a day." Following this construction of the statute, we must hold that the defendant has not incurred the penalty sought to be recovered.

There is error. The judgment of the superior court must be reversed.

Error. Reversed.

WHITEHEAD & STOKES

v.

WILMINGTON AND WELDON R. R. Co.

(*North Carolina. Advance Case. 1882.*)

Section 2 of the acts of North Carolina of 1874 and 1875, chap. 240, imposing a penalty upon railroad companies for allowing any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the company and the shipper, is a valid act.

Said act is not to be deemed unconstitutional on the ground that it contravenes the charters of railroad companies formerly granted, or because it may indirectly operate upon commerce outside of the immediate jurisdiction of the state.

In an action to recover the penalty provided by the said act, the provisions thereof are to be construed strictly in favor of those charged with violating its provisions. The rigid rules of the common law with reference to the liability of common carriers, should not be applied where in such case it appears that the delay in shipping the goods has been caused by circumstances which the railroad company could not have been expected to provide for, and which have occurred entirely without fault on the company's part, *semble* that it will be held excused from liability.

A railroad company accustomed to transport cotton, owned 120 flat cars which were usually ample to carry on all its business in that line. In the autumn of 1881, the cotton crop was very heavy and there were many delays in consequence. At the same time, a connecting line over which much of the cotton was forwarded, gave notice that it would thereafter transport cotton only in box cars and not in flat cars. The company first above named had not sufficient box cars to carry on its business and was wholly unable at once to obtain more. At this juncture, A. & Co. delivered certain cotton to the railroad for transportation, receiving a through bill of lading over the connecting line, which bill contained a clause providing that the cotton was received for transportation "at the company's convenience." A. & Co., although well able to read, did not notice said clause until after the bringing of the suit hereinafter mentioned. The cotton was not shipped for more than five days, owing to the circumstances above mentioned, in a suit by A. & Co. against the railroad company to recover the statutory penalty.

Held, that under the circumstances of the case, the clause above cited in the bill of lading was a valid one, and might be taken advantage of by the company and that therefore plaintiffs could not recover.

Brown & Battle, for Whitehead & Co.
John L. Bridgers, Jr., for the Company.

ASHE, J.—This is a civil action begun before a Justice of the Peace, and brought by appeal to the Superior Court of Edgecombe County, where it was tried at the Spring Term, 1882, of said court.

The action was brought to recover the penalty under Section 2, Acts of 1874 and 1875, chap. 240, for failing to ship the cotton of the plaintiffs for five days after its delivery.

The act imposing the penalty sued for is as follows, to wit: "It shall be unlawful for any railroad company, operating in this State, to allow any freight they may receive for shipment to remain unshipped for more than five day unless otherwise agreed between the railroad company and the shipper, and any railroad company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same."

The parties waived a trial by jury and submitted the issues of fact and law to be tried by the court.

The following are the facts found by his Honor, Judge Bennett, and his conclusions of law upon them:

1. That the plaintiffs delivered to the defendant's agent, at Battleboro station, on the 2d day of November, 1881, four bales of cotton consigned to Treadwell & Co., at Norfolk, Virginia.

2. That a bill of lading, of which the following is a copy, was executed the day the cotton was delivered:

(DUPLICATE.)		F. D. 8.			
No. 264.					
Wilmington & Weldon Rail Road.					
<i>Brattleboro Station, Nov. 2. 1881.</i>					
Received of Whitehead & Stokes					
for transportation at Company's convenience, with liberty to compress while in transit, as per marks and directions as herein given, subject to the conditions stated upon the back of this receipt, and to which, by the acceptance thereof, the shipper assents, the following described Bales of Cotton:					
MARKS.	NUMBERS.	WEIGHT.		CONSIGNEE AND DESTINATION.	No. Bales
		Shippers.	Rail Road.		
W. & S.		18 00		A. Treadwell & Co., Norfolk.	Four (4)
		Road not responsible.		"In witness whereof the agent hath affirmed to two Bills of Lading, both of this tenor and date, one of which being accomplished the other to stand void."	
<i>To be shipped via.....</i> <i>At through rate of..... per.....</i>					
				A. J. HOBGOOD, Agent.	

3. That said bill of lading was on the same or on the next day put into the hands of W. D. Stokes, one of the firm of Whitehead and Stokes.

4. That the two members of the firm of Whitehead & Stokes are educated men, able to read and write.

5. That the cotton delivered by Whitehead & Stokes to the defendant for which the bill of lading was given, was not shipped by the defendant until the 14th day of November, 1881.

6. That the firm of Whitehead & Stokes, did not know until the commencement of this action before the Justice of the Peace, the contents of the bill of lading—that they never read it until after the action was commenced. The agent of the defendant company did not know the contents of the bill of lading until after this action was commenced.

8. That the Wilmington and Weldon R. R. Co. is a connecting link in the Atlantic Coast Line.

9. That the rolling stock of the Wilmington and Weldon R. R. Co. was sufficient to carry and transport all the freight which came to it, either as through or local freight, with prompt dispatch.

10. That early as September, 1881, the Seaboard and Roanoke R. R. Co., one of the links of the Atlantic Coast line, notified the defendant company that it would not transfer over its road flat cars belonging to the Wilmington and Weldon R. R. Co. loaded with bales of cotton.

11. That during the months of October, November and December, 1881, there was an increase of 4836 bales of cotton carried by defendant over its road, as compared with the same months of the year before.

12. Of such increase, 734 bales were at points South of those two places.

13. That the defendant owned 120 flat cars, each of capacity to carry 40 bales of cotton, and that they could not have been replaced with box cars between September and November, 1881.

14. That the defendant shipped no cotton beyond its immediate line on flats after the notice from the Seaboard and Roanoke Road, but that it did ship some flat loads of cotton, which were received by it from the North Carolina R. R.

15. That the shipment of cotton over the defendant's road was greater in November each than in October, 1881.

16. That the cotton for which the bill of lading was given was through freight. The plaintiff applied for and received a bill of lading to Norfolk, Virginia, a point without this State and beyond the terminus of defendant's road.

17. That a through bill of lading was advantageous to the plaintiffs by giving them lower rates, and was beneficial to the defendant in that it saved the breaking of bulk at Weldon. Through bills of lading have been in use by the defendants for ten years.

18. That there was an increase in the tonnage carried over defendant's road during October, November and December, 1881, of 11,054,337 pounds.

19. That the cotton received by defendant of plaintiffs, was carried through to Portsmouth in cars belonging to defendant.

20. That the refusal of the Seaboard and Roanoke road, to carry flat cars of the defendant, loaded with cotton over its road, and the increased tonnage of the defendant's freights, and detention of defendant's cars at Portsmouth, were causes of delay in carrying through freights.

21. That the plaintiffs knew that the cotton was not shipped within five days after the delivery of it to the defendant, and yet, made no objection before the 14th of November, 1881, to the bill of lading—but he did not know at the time, that is, during the delay in the shipment of the cotton, the contents of the bill of lading.

22. That the defendant has used flat cars for ten years in the shipment of cotton.

23. That the shipment was not caused by competition for through freights.

24. That the defendant employed the services of a "Car Tracer," and used the wire daily, or almost daily, to get its cars returned promptly from Portsmouth.

25. That if the defendant's cars had not been used to carry freights to Portsmouth, all freight could have been moved without delay.

26. That the form of bill of lading hereto annexed was first used by the defendant after the ratification of the Act of 1874 and 1875, chap. 540.

27. That as a matter of fact, the defendant ran over its road two kinds of freight trains only, to wit: "Through and Local," and that it ran the same number of each trains daily, and that the through freight trains took no freight which came to the defendant along its line between Wilmington and Weldon, except at Goldsboro. Now and then it took on cars. That their freight trains were made up of cars belonging to the Seaboard and Roanoke road, as well as to the Wilmington and Weldon road.

28. That defendant allowed the plaintiffs' cotton, which was received by the defendant for shipment, to remain unshipped for six days in excess of the five full days of demurrage.

The conclusion of the court, as a matter of law on these findings of facts was, that the defendant was liable to the penalty of twenty-five dollars per day for six days.

And judgment was accordingly rendered in favor of the plaintiffs, and the defendants appealed.

The defendants excepted to the conclusions of law found by the Court, because:

1st. Under the facts found, the defendant is exonerated from the penalty and the judgment is erroneous.

2d. By applying for a bill of lading to have freight shipped beyond the State, and defendant's terminus, and receiving the same, the plaintiffs thereby waived the penalty.

3d. The plaintiffs having received the said bill of lading, and having made no objection thereto were bound by its terms.

4th. The act cannot be construed to embrace freight agreed to be shipped as through freight by defendant and beyond defendant's line and out of the State.

5th. The act in question is unconstitutional. (1.) The act is in contravention of defendant's charter. (2.) In that it effects interstate commerce.

We cannot concur in the conclusion of law to which the court came, upon the facts found.

The action is brought upon a penal statute which is always to be construed strictly in favor of those who are charged with violating its provisions. The rigid rules therefore of the common law with reference to the liability of common carriers should not be applied to a case involving the violation of a penal statute.

In the case of *Branch v. Wilmington and Weldon R. R. Co.*, 77 N. C. 347, which like this was an action to recover the penalty given by the Act of 1874-75, it was very clearly intimated, that the excuse of inability to provide cars sufficient to transport the freight delivered to it in consequence of the accumulation of freight, would have availed the defendant as a defence to the action, if it had not caused the accumulation by a competition with other roads for through freights.

In the case of *Keeter v. W. and W. R. R. Co.*, 86. p. 346, which has been referred to as authority for the position that no excuse is admissible to exempt a railroad company from the penalty, when it has violated the letter of the statute. It may be well to observe that this court did not enter fully into the discussion of that question for it was not necessary to do so, as the case turned upon the point that the delay with which the defendant was charged had not continued beyond five full running days. Branch's case was cited as authority for that position, and the case went off upon that point. The other point, as to the excuse, did not engage the special attention of the court, as its consideration was not necessary to the decision of the case, but the court could not have intended to hold that there could be no excuse, when it was citing Branch's case with approval, in which it is conceded that excuses may be admitted.

The question then is, has the defendant incurred the penalty, or are the excuses given by it sufficient to exonerate it from liability.

The statement of the case discloses the following facts, viz.:

That there was a considerable accumulation of freights along the

line of defendant's road during the months of October and November, caused by an increase in the crop, but not by any competition of the defendant for through freight.

That it had been shipping cotton upon flat cars over the Seaboard and Roanoke R. R. for ten years previous to October, 1881, and had 120 cars each with capacity to carry 40 bales of cotton, which were sufficient to carry all the freights that came to it, either as through or local freight, with promptness and dispatch. But some time in September, 1881, the Seaboard and Roanoke R. R. Co. notified the defendants, that they would not transfer over its road flat cars belonging to defendant company loaded with bales of cotton. And after that box cars in place of these excluded cars could not have been procured before the 2d of November, when the cotton was delivered by the plaintiffs for shipment. After the exclusion of its flat cars from the Seaboard and Roanoke R. R., the defendant was put under the necessity of running through to Portsmouth its box cars to carry freight through and but for that could have transported all the freight delivered.

The delay in shipping the plaintiffs' cotton was caused by the increase in freights, the refusal of Seaboard road to admit the defendant's cars on their road loaded with cotton, the detention of its box cars at Portsmouth, and its inability to procure other cars in time for this shipment, and for these causes of delay it does not appear that the defendant was in any way responsible. He could not have prevented the increase of freights nor the unexpected action of the Seaboard road in reference to its flat cars—and it seems it did all in its power to prevent the detention of its cars at Portsmouth. It employed the services of a "Car Tracer," and used the wires daily, or almost daily to get its cars returned from Portsmouth.

It is true, if the defendant's box cars, had not been used to carry the freights through to Portsmouth, the plaintiffs' cotton, and all other freights could have been moved without delay. But a through bill of lading is advantageous to both parties—to the defendant, by saving it the trouble and expense of breaking bulk at Weldon; and to the plaintiffs by giving them lower rates of transportation; and this is probably the reason why they applied for and received a bill of lading for through freight to Norfolk, Virginia. And after doing so, it will not do for them to say, if their cotton had been shipped only to Weldon and the defendant's box cars had not been used to carry cotton to Portsmouth the delay would not have occurred.

The delay in making the shipment, then, it seems, has not been caused by any act of negligence or default on the part of the defendant, but resulted from the concurrence of circumstances entirely beyond its control—and if a common carrier can be exonerated in any case from the penalties given by the statute, we think this is one of the cases where he should be excused. When the facts as

found in this case show that by force of circumstances for which it was in no way responsible, it was disabled from performing the duty imposed by the statute it would be unjust to punish it for failing to comply with its requirements.

Every common carrier who receives goods for transportation, is bound to ship them within a reasonable time, and when the common law imposes that duty, and the Legislature defines what is reasonable time, and subjects to a penalty the failure to comply with its requirements, unless otherwise agreed between the railroad and the shipper, the burden is on the railroad company to show the agreement relied upon in its exoneration. The defendant here says there was such an agreement, between it and the plaintiffs, and points to the restriction in the bill of lading given the plaintiffs—which is, that the cotton of plaintiffs is received for transportation at the company's convenience.

That a railroad may restrict its common law liabilities, except for its own or its servants' negligence, is now generally admitted to be law. Redfield, on Railroads, pp. 99–100, and the authorities there referred to; *Capehart v. W. and W. R. R. Co.*, 81 N. C. Reports, and cases there cited. But to avail the defendant, the restriction must be brought to the knowledge of the shipper, and it is held that a restriction in a bill of lading given to the shipper at the time of the delivery of the goods, and received by him, without remonstrance or objection, is evidence of an assent to the restriction, or is equivalent to an express agreement. *Burgess v. Townsend*, 37 Ala. 247; *Belger v. Davismore*, 54 N. Y. 166, etc.

The plaintiff, however, says he did not read the terms of the shipment, until a few days before the action was commenced; but they could read; the condition is in full print upon the face of the bill of lading, and it was their own fault they did not read it. We think it effected them with legal notice. *McMillan v. Railroad Company*, 16 Mich. p. 79.

There was here then an agreement between the plaintiffs and the defendant company, to ship the plaintiffs' cotton at its convenience; and the question resolves itself into the inquiry whether the restriction or agreement was reasonable. Except under circumstances like these disclosed in the case, we should unhesitatingly hold that it was not a reasonable restriction upon defendant's liability. When it is its duty to ship in a reasonable time, and the law limits the time to five days, a stipulation to ship at convenience, is too indefinite and therefore unreasonable. But under the extraordinary combination of adverse circumstances developed in this case, over which the defendant had no control, nor power, nor means to prevent or foresee, we must conclude the condition was not so unreasonable as to prevent the defendant from setting it up as a defence, in an action for the penalty prescribed by the statute.

The view we have taken of the case thus far disposed of the first

four points of law taken by the defendant in the court below. But the defendant also insisted that the act of 1874-5, was in violation of the constitution and in contravention of its charter. Both of these questions are definitively settled adversely to the defendant's positions by the decision in the case of *Branch v. W. and W Railroad*, *supra*.

The defendant further contended that the act of 1874-5, affected inter-state commerce, and was therefore void. But this question has been as authoritatively settled as these just mentioned. The Supreme Court of the United States has recently decided that railroads, as common carriers, exercise a sort of public office and have duties to perform in which the public is interested, and that being so, they are subject to such regulations as may be established by the proper authorities for the common good, and when a railroad is situated within the limits of a single state, its business is carried on there and its regulations being a matter of domestic concern, if it is employed in state, as well as inter-state commerce, until Congress acts, the State must be permitted to adopt such rules and regulations, as may be necessary for the promotion of the general welfare of the people within its territory—though in doing so, it may indirectly operate upon commerce outside its immediate jurisdiction. *Munn v. Illinois*, 4 Otto, U. S. 113, and *Chicago, etc., R. R. Co. v. Iowa*, 155. *Ibid*.

In view of the special circumstances of this case, our conclusion is that the defendant is exonerated from liability to the penalty, and that there was error in the judgment of the Superior Court, which is, therefore, reversed, and judgment must be entered here for the defendants.

Error reversed.

Cf., 7 Am. & Eng. R. R. Cas. 623, and note.

BALDWIN & Co.

v.

THE LONDON, CHATHAM, AND DOVER RY. CO.

(L. R. 92, Q. B. 582. Aug., 1882.)

On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected

them; and ultimately the rags were found useless for any purpose, and were destroyed.

There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without informing the defendants that special care was necessary.

Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods—

Held, that the ruling of the judge was correct.

The plaintiffs sued the defendants for £43 6s. 8d. damages for wrongful conversion of eighteen bales of rags, and for the like damages for breach of contract.

At the trial before the judge of the Southwark County Court, it appeared that on the 19th of December, 1881, the plaintiffs delivered to the defendants in London eighteen bales of rags, of the value of £43 6s. 8d., to be conveyed to Messrs. Monckton at the Wrotham station, at which place it was admitted that they would in the ordinary course of business arrive within twenty-four hours. By mistake they were sent to another station, and did not reach Wrotham station until the 4th of January, 1882. On that day the station-master at Wrotham wrote to the plaintiffs informing them that "the rags had been traced, and that endeavors were being made to induce Messrs. Monckton to accept them;" and on the 7th the station-master again wrote to the plaintiffs informing them that the rags had been refused by Messrs. Monckton in consequence of "the quality not being suitable," and requesting instructions as to the disposal of them. The plaintiffs declined to give any instructions, and the rags, having been packed in a damp state, heated and rotted and became such an intolerable nuisance that the defendants were obliged to and did destroy them.

It appeared by the evidence of the plaintiffs that rags packed in a damp state will heat and rot in a few days (much less than a fortnight), and become worthless except for manure; and that in the month of January they could not be sold even for that purpose: but that rags packed dry would not be injured by a delay of six months or even more.

It was admitted by the plaintiffs that the defendants had no notice that the rags were packed in a damp condition, the bales being merely described as "Rags."

Upon these facts the county court judge nonsuited the plaintiffs so far as regarded the claim for a wrongful conversion; and, relying upon the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, he directed a verdict and judgment to be entered for the plaintiffs on the second head of claim, but for nominal damages only,—observing that although, as far as he knew, the rule had hitherto

been applied only to the loss of profits by delay in the transit of the goods, he could see no reason why it should not apply also to loss or depreciation in respect of the goods themselves through the same cause. And, further, that the proximate cause of the loss of the goods was the improper condition in which they were packed, and not the delay.

Aug. 8. Gaskell moved to increase the damages to £43 6s. 8d., the admitted value of the rags at the time when they ought to have been delivered to Messrs. Monckton. The true measure of damages in an action against a carrier for the non-delivery of goods in a proper and reasonable time is the difference between their market price at the time at which they ought to have been delivered, and their market value at the time of delivery to the consignee and in their then condition. If in consequence of the delay the goods are destroyed or lessened in value, the extent to which they are so deteriorated is the proper measure of the carrier's responsibility: *Illinois Central Ry. Co. v. McClellan*, 54 Ill. Rep. (Am.) 58. That was an action for not delivering corn within a reasonable time, whereby it became heated and spoiled. And see 2 Sedgwick on Damages, 7th ed. 115.

[MATTHEW, J. The company had a right to assume that the bales contained dry rags, not damp. The plaintiffs gave them no notice that they were in a condition to be destroyed by a delay of three weeks.

CAVE, J. No harm would have happened to the rags if they had not been delivered to the defendants in a damp state. The result, therefore, can hardly be said to be such as would be in the contemplation of the parties.]

In *Hooper v. London and North Western Ry. Co.*, 50 L. J. (Q.B.) 103, the plaintiff's portmanteau, containing a brace of pheasants, was delivered by the company three months after the proper time, and he recovered £15 agreed damages for the injury done to the other contents of the portmanteau. It was never suggested that it would be a case for nominal damages only. If the defendants had performed their contract, the damage here complained of could not have occurred.

MATTHEW, J. I think the decision of the county court judge was quite right. The true measure of damages in a case of this kind is that which may fairly be said to have been in the contemplation of the parties at the time as the natural consequence of a breach of contract on the part of the defendants. The goods in question were not delivered or tendered to the consignees until fourteen days after the time at which they ought to have been delivered. What were the natural or necessary damages resulting

from that delay? If the rags had been dry when delivered to the company, the damage would have been nil. The rags however were then damp, and hence their destruction. But the company did not know they were damp. It was the duty of the plaintiffs to inform the company at the time, if special care were required in dealing with the rags. The point was not raised in *Hooper v. London and North Western Ry. Co.*, 50 L. J. (Q.B.) 103.

CAVE, J., concurred.
Rule refused.

M. MEYER, Appellant,

v.

VIRGINIA AND TRUCKEE R. R. Co., Respondent.

(16 Nevada Reports, 341. Oct. 1881.)

The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiffs and his assignors were burned therein, as to what occasioned the fire: *Held*, upon the facts stated in the opinion, inadmissible in evidence.

Where the record on appeal fails to show that an instruction was applicable to the evidence, the action of the court in refusing it will be sustained even if the reason given by the court for its refusal was not sufficient.

Instructions that are not pertinent to any issues in the case should be refused, although they embody correct propositions of law in the abstract.

Plaintiff complained of an instruction given by the court of its own motion: *Held*, that even if it was erroneous it could have done no harm to plaintiff, because it was but a repetition, in substance, of one given at his request.

APPEAL from the District Court of the Third Judicial District, Lyon County.

Lewis & Deal, for Appellant:

B. C. Whitman, for Respondent.

LEONARD, C. J.—It is alleged in the complaint herein, that on the 13th of Sept., 1879, the plaintiff and other persons named were the owners of certain personal property of the value of two thousand six hundred and forty-nine dollars and eighty-five cents, which property was, on said day, stored by defendant in its warehouse, at the Mound House, on the line of its road; that the claims for damage of the other parties mentioned were, prior to the commencement of this action, for a valuable consideration paid by plaintiff, sold, assigned, transferred, and set over to plaintiff; that defendant's locomotives were so imperfectly constructed and so deficient in the usual and ordinary appliances used on locomotives

to prevent the escape of fire, sparks, and coals, and said locomotives were so carelessly run and managed by defendant's agents, servants, and employees, that said warehouse was fired and completely destroyed by fire carelessly and negligently dropped and thrown from said locomotives; and all said personal property in the complaint described was destroyed by said fire, whereby plaintiff and the other parties mentioned were damaged in the sum of two thousand six hundred and forty-nine dollars and eighty-five cents.

Defendant answered and admitted that the warehouse and the said property of plaintiff and his assignors were destroyed by fire at the time and place alleged; but, among other things, denied all allegations charging imperfect construction of its engines and deficiency in the usual and ordinary appliances used thereon to prevent the escape of fire, sparks, and coals. It denied all allegations of carelessness or negligence in running or managing its engines, or that the fire was caused by any act or omission of it or any of its agents, employees, or servants; or that plaintiff, or any of his assignors, had been damaged in any sum by reason of any carelessness or negligence of the defendant or any of its agents, servants, or employees. The verdict and judgment were for the defendant. This appeal is taken from an order overruling a motion for new trial and from the judgment.

1. It is urged by appellant that the court erred in refusing to allow witness Burnett to answer the following question, asked for the purpose of showing that defendant's engines fired the warehouse, viz.: "At the time the building was burning, did you make any statement to J. R. Shaw as to what occasioned the fire? If so, what was that statement? Shaw was one of the owners of goods burned, and one of plaintiff's assignors, and he was also asked to state whether or not Burnett told him, at the time the building was burning, what occasioned the fire, and, if so, what that statement was. The court refused to permit the witness to answer, and its action in respect to these questions presents an important subject for our consideration. No part of the evidence admitted is set out in the transcript. It is only shown that, at the trial, "each party introduced evidence tending to establish the issues raised by the pleadings;" and it is agreed that, at the time of the fire, Burnett was defendant's agent, having charge of the station and the warehouse burned. In its order overruling the motion for a new trial, the court said: "Burnett's agency was confined to the charge of the station and warehouse; he had no charge over the engines, or any authority to run or manage them. His business, as station and warehouse agent, had no connection with the construction or the management of the engines." There can be no serious difference of opinion in relation to the law of evidence touching the

question in hand, but it is oftentimes difficult to apply the law to the facts presented.

Mr. Justice Story thus states the general principle: "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*." (Story on Agency, sec. 134.)

And in *Enos v. Tuttle*, 3 Conn. 250, which has since been followed in the same state, and been recognized as sound law by other courts, it said that declarations to become a part of the *res gestæ*, must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction.

In *Franklin Bank v. Navigation Co.*, 11 G. & J. 33, the court said: "In general, declarations or statements by third persons are inadmissible; that, however, is not the universal principle, and does not apply to the authorized declarations or representations of an agent. The rule springing from the relation of principal and agent being that the representations or declarations of an agent made in the course of and accompanying the transaction which is the subject of inquiry, and, acting within the scope and limits of his authority, may be proved. But it does not extend to declarations or statements made after the transaction, though in relation to it; and the principle upon which the declarations or representations of an agent within the scope of his authority, are permitted to be proved is that, such declarations, as well as his acts, are considered and treated as the declarations of his principal. Whatsoever is so done by an agent is done by the principal through him as his mere instrument. So, whatsoever is said by an agent, either in the making a contract for his principal, or at the time and accompanying the performance of an act within the scope of his authority, having relation to, and connected with, and in the course of, the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent, but on the ground that, being made at the time of, and accompanying, the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestæ*, a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying . . . the doing of an act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon the principal, not being a part of the *res gestæ*, and are not admissible in evidence, but come within the

general rule of law excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done; not a part of the transaction, but only statements or admissions respecting it, and if they relate to anything resting within his knowledge material to either party, it must be proved by his testimony, and not by evidence of his mere assertion, which is no proof of it."

From the great number of cases bearing upon this question, but presenting different facts, we refer to the following, which established the rule as stated above: *Fairlie v. Hastings*, 10 Vcs. Jun. 125; *Kirkstall Brewery Co. v. Furness Railway Co.*, 9 Law Rep. Q. B. Cas. 470; *Haynes v. Rutter*, 24 Pick. 245; *Ashmore v. Penn. S. T. & T. Co.*, 38 N. J. L. 14; *Byers v. Fowler*, 14 Ark. 105; *Penn. Railroad Co. v. Brooks*, 57 Pa. St. 343; *Magill v. Kauffman*, 4 S. & R. 320; *Franklin Bank v. Cooper*, 39 Me. 555; *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *Runk v. Ten Eyck*, 24 N. J. L. 760; *Gerke v. Cal. Nav. Co.*, 9 Cal. 256; *Bradford v. Haggerty*, 11 Ala. 701; *Verny v. The B. C. R. & M. R. Co.*, 47 Iowa, 551; *Thalhimer v. Brinkerhoff*, 4 Wend. 398; *Bank of the Northern Liberties v. Davis*, 6 W. & S. 289; *Pemigewassett Bank v. Rogers*, 18 N. H. 261; *Maury v. Talmadge*, 2 McLean, 159.

It remains to apply the law to the facts as they are presented. There were two important facts which plaintiff was bound to prove in order to recover. First, that the fire was caused by sparks or coals from the defendant's engines; and second, that their escape from the engines was due to the imperfect construction of the latter, or the careless or negligent management of the same. These were independent, vital issues. The station agent's duties had no connection with either; that is to say, as to the origin of the fire or the negligence charged, he was not the inculpat agent, and no negligence is alleged against the defendant by reason of his failure to use all means in his power to save the goods. The interval of time that elapsed between the escape of the sparks or coals from the engines, and the making of the statement, is not shown. It seems, however, from the form of the question, that it was while the building was burning. The goods may have been destroyed at the time, and, consequently, the entire injury to owners may have been complete when it was made. It may be, therefore, that in any view, the declaration was a mere narration of a past transaction, and that for this reason alone, according to all the authorities, it was inadmissible. But whether it was so or not, a question we do not decide, our opinion and conclusion will be based upon other facts.

For many reasons we are satisfied that Burnett's declaration was inadmissible. Under the circumstances shown any declaration by him as to the origin of the fire could not have been competent testimony, although the fact of burning, if that had been in issue,

under certain circumstances, might have been proven by the agent's declaration. Under possible conditions a statement by the agent of the fact of burning might have been within the line of his duty, but in the absence of special authority it could not have been any part of his duty, or in his power, to explain how the fire originated. It was Burnett's duty to deliver the goods when they were called for; and if Shaw had not known that they had been burned, or were in such condition that they could not be delivered, and had demanded them, or made inquiries in relation to them which rendered it necessary for Burnett to deliver them, or upon failure to do so, to give a reason for his failure, then any statement as to the cause of the failure, necessary to explain the same, would have been admissible; but the only necessary explanation would have been to the effect that they had been burned. Any statement beyond that fact would not have been required in order that the agent might perform his entire duty to Shaw; and not having been engaged in the performance of any act or duty within the scope of his authority, at the time, he had no implied power to make any statement which the defendant was under no obligation to make.

Any inquiry as to the origin of the fire was of no consequence to Shaw, except as a means of proving one of the essential facts in this case in order to bind the defendant—a fact which the latter was in no manner bound to furnish. A statement as to the origin of the fire did not assist Shaw in obtaining the goods, and it was of no possible benefit, except as a means of establishing defendant's liability as above stated. It was, then, a declaration voluntarily made by Burnett. It was outside of his duty as agent and beyond the scope of his authority. If he had authority to state how the fire originated, under the circumstances shown, he had power, also, to declare that the engines were carelessly managed or improperly constructed. Such declarations would not have been necessary for the proper discharge of his duties to Shaw, and he had no implied authority to make them, and thereby bind the defendant.

This is, perhaps, a sufficient answer to appellant's claim of error upon this point, but there are others, some of which we proceed to state.

It is not shown that Burnett at the time the declaration was made was engaged in the performance of any act or duty imposed upon him by his employment, or that it was made in pursuance of any duty as agent. True, he was agent, and as such had charge of the station and warehouse; but for aught that appears, he was doing nothing as agent, either within or without the line of his duty. He and Shaw may have been standing idly by, or sitting down at a safe distance from the scene of conflagration. The statement may have been a casual remark made by the agent of his own motion, or it may have been made in reply to a question asked by

Shaw for the purpose of gratifying his curiosity, or of acquiring information which neither the defendant nor its agent was under any legal or moral obligation to impart. In *Franklin Bank v. Steward*, 37 Me. 524, the witness, at the request of Steward, called at the bank and inquired of the cashier if a note, on which Steward was surety, had been paid, and the cashier replied that it had been. Witness communicated the answer to Steward, who then gave up security held by him, and the maker of the note thereafter became insolvent. The court held that it was not the duty of the bank to communicate such information further than it was to be ascertained from its records and papers, and said: "Such communications are matters of courtesy and convenience, not of right. Being no more matters of duty on the part of a bank than on the part of an individual, its cashier cannot be considered its official or authorized agent to make them, unless they constitute a part of some transaction performed at the time of making them."

And although in *Hynds v. Hays*, supra, it was decided that it was a part of the official duty of a bank manager to deliver bills that had been paid, when called upon so to do; that his failure to do so when demanded was an act for which the bank was responsible, and that the manager's declarations at the time, in explanation of the failure, was a part of the act, and consequently admissible in evidence; still, the court said: "The declarations of an agent made while actually transacting for his principal the business to which the declarations relate are admissible only because they are part of the *res gestæ* and are proper for a correct understanding of the acts. They are said to be verbal acts. But the oral admissions of even a party are often loosely and inconsiderately made, and are then, in the very nature of things, very unreliable evidence, and it is not certain that justice would not often be better attained without them. We do not think it would be wise, at any rate, to extend the rule so as to make evidence of the admissions of the agent when not engaged in the business which the admissions tend to explain. A man does not weigh his own casual observations, and is very liable to be misunderstood. It is enough to hold him responsible for his own words, without also charging him with those of his agent, who is not employed to bind him by utterances, except in connection with business, and while it is being done. (And see *Garth v. Howard*, 8 Bing. 453.)

Pool v. Bridges, supra, was an action of trover against a deputy sheriff who attached wool, etc., as the property of one Scholfield. Plaintiff claimed it, and at the trial a witness was permitted to testify that the plaintiff called on Scholfield about a week before he absconded, to ascertain what progress he made in manufacturing his wool; and that Scholfield then showed him wool, yarn and bocking, which he said were plaintiff's, and which plaintiff examined; and that the wool, etc., thus shown were the same that were

attached by the defendant. Upon these facts the court said: "The property in question is supposed to have been in the possession and under the control of Scholfield. It appears, also, that it was so situated in regard to other property of the same kind belonging to Scholfield himself, or to other persons, that none but Scholfield could distinguish them. If he had been heard to say that the particular parcel in question belonged to the plaintiff, without being engaged in any transaction relating to the property, this would be mere declaration and hearsay. But if he was then employed in any act respecting the goods, such as separating different parcels for the purpose of distinguishing what belonged to one person and what to another, what he said while he was doing it would be considered as a part of the transaction, and admissible in evidence. It would be like labeling the goods with the name of the owner, which though in one sense a declaration, yet would be construed an act indicative of proprietorship of the goods." Declarations standing by themselves are hearsay; there must be some main fact or act, which is itself admissible in evidence." *Lund v. Inhabitants*, etc., *supra*, and *Mason v. Croom*, 24 Ga. 216; *Mateer v. Brown*, 1 Cal. 224.

So in *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 160, this language is used by the court: "As principal evidence it was incompetent, being the declaration of a third person, who, though an agent of the defendants, was not then engaged in the performance of any act relating to his agency, so as to bring the case within the rule which allows the declarations of an agent as a part of the *res gestæ*."

Roberts v. Burks, 12 Am. Dec. 325, was trover against four defendants. Two of them were the owners of a warehouse, and the other two did business for them as warehouse agents. The only testimony adduced to charge the owners was the acknowledgment of the agents that the goods were in the warehouse, and that they had taken them out and shipped them aboard of a boat belonging to the owners of the warehouse, and at their order, to make up a deficiency in the load. We quote from the opinion: "The principle that the declarations or confessions of an agent, except they be made at the time and compose a part of the acts done by him for his principal within the scope of his authority, can not be given in evidence to change the principal, is too well settled to need authority to support it. The confessions of the agents in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations. The evidence was, therefore, incompetent as to the keepers of the warehouse and insufficient to warrant a verdict against them."

But it is urged that the declaration was admissible because it was

a part of the agent's right and duty to make it, and, consequently, that he had authority so to do and to bind defendant thereby

Let us admit that an agent authorized to conduct a business enterprise is to be regarded as empowered to take all steps necessary to carry on the business; that there is an implied authority to do all things necessary for the protection of property intrusted to his keeping, or for fulfilling a duty which has to perform; that an agent's admissions bind his principal if the former is delegated to conduct business of such a nature that its due and ordinary prosecution requires admissions to be made by him in the exercise of the discretion which it is his duty to use in conducting the business intrusted to him. Still, none of these principles justify the admission of the agent's statement in this case. Burnett had charge of the warehouse and of the goods. Presumably his duty was to protect the goods and deliver them to the owners when demanded, upon payment of charges due; and if for any reason he was unable to deliver them upon demand, it is probably true that a failure to do so would have been an act, and that declarations necessary for a proper explanation thereof would have been admissible, if made at the time. But it is not shown that there was a demand or inquiry prior to the statement, or that when the latter was made, any proper explanation was required by Shaw, in order that he might know just how the goods were situated, and that they could not be delivered. It certainly was not the agent's duty to make delivery without request so to do; and it was not his duty to make explanation of the cause of inability to deliver, if Shaw was already aware of it. Until delivery became a duty there was no failure on the agent's part; consequently, there was no act to be qualified or explained, and for this reason the statement was incompetent.

Three cases were cited by appellant in support of the claim that it was the agent's right and duty to state not only that the goods were burned, but also as to the origin of the fire.

The first is *Morse v. Conn. River R. R. Co.*, 6 Gray, 450. The case shows that the next morning after a trunk had been lost, in accounting for it, upon inquiry made by the owner, or in his behalf, the conductor or baggage-master told the witness that, the night before, a gentleman stepped up and claimed, and took a trunk of the same description. But the same morning, the station agent told the witness that he thought the trunk was carried to Northampton, the night before, with other baggage. At the trial the court refused to allow the facts above stated to be given in evidence.

This was held to have been error, and the court said: "It was part of the duty of those agents to deliver the baggage of passengers, and to account for the same if missing, provided inquiries for it were made within reasonable time. These declarations were, therefore, made by them as agents of the defendants, within the

scope of their agency and while it continued." The distinction between that case and this are so apparent that comment is unnecessary. For aught that appears, it may have been proven that it was a part of the agent's duty to account for missing baggage. If so, that fact was decisive against the defendants. But at all events, it was his duty to deliver the baggage of passengers when called for, and it is shown that inquiries were made on behalf of the plaintiff in relation to the same. Under such circumstances it may well be said that failure to deliver was an act, and that statements made by him explanatory thereof, were a part of the *res gestæ* and admissible. But in the case at bar, as we have seen, it is not shown that Shaw demanded the goods, or expected to receive them, or that the agent was at the time in any manner engaged in the performance of any duty required of him, or that he was empowered to make the declaration, or that it was necessary for the proper discharge of his duties.

The second case is *Burnside v. Grand Trunk R. R. Co.*, 47 N. H. 554, and the principle decided is the same as in the one just referred to. Commenting upon this case in *Packet Co. v. Clough*, 20 Wall. 541, the court said: "It simply decides that the statement of the general freight-agent, as to the condition of goods delivered to him for transportation, made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of a contract unexecuted, and while it remained unexecuted, the agent had power to vary it; had in fact complete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority." It was the defendant's duty under a contract to deliver certain bags at Milwaukee, and it was the agent's duty to see that the contract was carried out. The bags were delivered to the agent for transportation in August, 1862, and in April, 1863, plaintiff applied to the agent for information concerning them. The agent told him he had ascertained they were at Sarnia, in defendant's depot, under a large lot of flour. It was plainly within the agent's authority and the line of his duty to find and forward the property at the time the plaintiff applied to him, and his statement explanatory of defendant's failure to comply with its contract was undoubtedly admissible as part of the *res gestæ*.

The third case (*Lane v. R. R. Co.*, 112 Mass. 462) is of the same nature, and the principles decided are identical with those enunciated in the sixth of Gray.

The court did not err in rejecting the agent's statement.

2. It is claimed the court erred in refusing to instruct the jury that, if they believed from the evidence, a locomotive engine, properly constructed and skillfully managed, would not set fire to a building near the railroad track, or to inflammable material that

could, when set on fire, communicate fire to such building; and that, if they believed from the evidence, plaintiff's property was destroyed by fire or sparks from defendant's engines, without fault or negligence on the part of plaintiff or his assignors, they would find for the plaintiff.

The reason assigned by the court for refusing to give this instruction was, that there was no evidence of any inflammable material that did, or could, if ignited, communicate fire to the building. There is nothing before us to show there was any evidence that an engine, properly constructed and skillfully managed, would not set fire to a building, or to inflammable material along the track. The instruction, therefore, may have been properly refused, even though the reason given by the court was not sufficient. (*Fulton v. Day*, 8 Nev. 84.) Every presumption is in favor of the action of the court, and if there was error it must be shown.

3. Appellant objects to the second instruction given for respondent, to the effect that, under the pleadings, the jury should find for the defendant, if they believed from the evidence that its engines were properly constructed and carefully run. The point of objection is, that the requirement of skill in the management of engines was ignored. We deem it unnecessary to declare whether or not an engine can be carefully run or managed, so far as the defendant is concerned, in the absence of skill on the part of the engineer.

The defendant was not charged with unskillful management of the engines. It is only alleged in the complaint that engines were carelessly and negligently run and managed. If there is a distinction between carelessly running an engine and unskillfully running it (a question we do not decide), proof of the latter fact was not admissible under the pleadings, and an instruction that the defendant was bound to manage its engines skillfully would have been error. Instructions that are not pertinent to any issues in the cause should be refused, although they embody correct propositions of law in the abstract. (*Conlin v. S. F. & S. J. R. R. Co.*, 36 Cal. 410.)

4. Complaint is made because the court instructed the jury that the defendant was required to use the "best generally known practical appliances within its reach," to prevent the destruction of the property by fire.

We shall not consider this instruction with a view of ascertaining whether it is or is not correct in principle. The defendant was only charged with negligence in failing to use engines having the usual and ordinary appliances for preventing the escape of fire; and, at the request of plaintiff, the court charged the jury that "the defendant was required to use the best known appliances to prevent injury to others from fire, and to employ careful and com-

petent engineers; and a railroad company which fails to use the best generally known practical appliances within its reach, to prevent the destruction of property, does not exercise the care of a man of common prudence." The instruction complained of, given by the court of its own motion, even though it was wrong, could have done no harm to plaintiff, because it was but a repetition, in substance, of the one given at his request.

We find no error in the record, and the order and judgment appealed from are affirmed.

See Note, 7 Am. & Eng. R. R. Cas. 419.

McGRAW

v.

B. AND O. R. R. Co.

(18 West Virginia, 361. Decided October 22, 1881.)

A common carrier at common law is liable for the loss or damage to goods received for transportation from whatever cause arising, except the act of God, the public enemy or the conduct of the owner of the goods, unless such loss or damage arises from the nature and inherent character of the property carried, provided he has used foresight, diligence, and care to avoid such damage and loss.

When a common carrier undertakes to convey goods, the law implies a contract that they shall be carried and delivered at the place of destination safely and within a reasonable time.

Freezing weather causing a loss of goods cannot be deemed the act of God, and does not come within the definitions given of that term.

But if the goods transported are frozen, it comes within the exceptions to that principle, and exempts the carrier from liability, provided he has been guilty of no previous negligence and misconduct, by which such loss or damage may have been occasioned.

The previous misconduct or negligence, which makes the carrier liable in such case, must be immediately or proximately connected with the loss.

What is "reasonable time," within which goods are to be delivered, cannot be defined by any general rule, but must depend upon the circumstances of each particular case.

The mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are matters properly entering into the consideration of what is reasonable time.

B. in Parkersburg delivered potatoes at the B. & O. R. R. Co.'s depot to be conveyed to McG. in Grafton on the 13th day of February, 1866, to be shipped on the 14th; there was a daily train between those points; the weather was mild and so continued on the 14th; the potatoes did not reach Grafton until the 16th, and arrived so frozen as to be worthless, the weather on the 15th and 16th having become cold.

Held, Under the circumstances of this case the company is liable in damages.

Writ of error and supersedeas to a judgment of the Circuit Court of the county of Taylor rendered on the 12th day of September,

1877, in an action in said Court then pending, wherein Thomas McGraw was plaintiff and the Baltimore and Ohio R. R. Co., was defendant, allowed upon the petition of said defendant.

Hon. C. S. Lewis, late judge of the second judicial circuit, rendered the judgment complained of.

The facts of the case are fully stated in the opinion of the court.

C. Boggess, for plaintiff in error relied upon the following authorities: 68 Pa. St. 302; 35 Ind. 39; 46 Miss. 458; 10 Wall. 176; 20 Pa. St. 171; 13 Gray, 481.

James Morrow, Jr., for defendant in error cited the following authorities: 7 W. Va. 54; 1 W. Va. 237; 7 W. Va. 171; 11 W. Va. 104; 6 Gratt. 189; 6 How. 344, 381; 5 Strobb. 119, 124; 1 Smith Lead Cas. (5th Am. ed.) 318; 1 Conn. 487; 5 W. Va. 293; 3 Munf. 239.

PATTON, J.—This was an action at law brought in the circuit court of Taylor County by Thomas McGraw against the Baltimore and Ohio R. R. Co. to recover the value of fifteen barrels of potatoes shipped by J. G. Blackford of Parkersburg, to the plaintiff at Grafton, which were so frozen when they reached Grafton as to be worthless, when the plaintiff refused to receive them. The action was commenced on the 28th day of June, 1868, and the cause was tried on the 11th day of September, 1877, when there was judgment for the plaintiff for the sum of \$114.07 entered upon a demurrer to the evidence by the defendant, the Baltimore and Ohio R. R. Co. The company obtained a writ of error and supersedeas to this Court.

By the evidence it appears, that on the 10th day of February, 1866, Thomas McGraw by letter ordered from J. G. Blackford, at Parkersburg, some potatoes to be sent to him at Grafton; that the distance from Parkersburg to Grafton was one hundred and four miles; that there was a daily way-freight train between those points leaving Parkersburg at about four o'clock A. M., and arriving at Grafton about four o'clock P. M., or, according to the testimony of one witness, leaving Parkersburg from six to nine A. M.; according to another witness the custom and usage of the company at Parkersburg was to receive no goods for shipment on the following day after three o'clock P. M.; the goods received prior to three o'clock P. M. one day it was understood were to be transported as early the next day as practicable.

J. R. Murdoch testified that he was in the employ of J. G. Blackford, and as directed by the said Blackford he shipped to Thomas McGraw at Grafton fifteen barrels of potatoes on the 14th day of February, 1866, "fifteen barrels were shipped from Parkersburg to the said McGraw on the 14th of February," having been delivered to the Baltimore and Ohio R. R. Co., and the said company having receipted to the said Blackford for them; the said

potatoes were shipped in good order, the weather at the time being safe and sufficiently warm to make the shipment prudent; the weather during the month of February was quite changeable, but at the time of the shipment was just stated, warm and safe; the weather was changeable, so much so as one day to be quite warm and next very frosty and freezing, and it may have grown colder the day following the delivery of this; I am not positive."

It also appears by the evidence, that the 15th and 16th of February were cold, freezing days; the potatoes were received at Grafton on the evening of the 16th of February so frozen as to be worthless. The dispatcher of trains testified, that the day before they reached Grafton, whether in the evening or morning he could not remember, McGraw came and inquired for the potatoes; that trains arrived on time on the 15th and 16th of February. An engineer of a freight train testified, that there was no train from Parkersburg to Grafton on the 13th or 14th of February; that at the instance of the agent at Grafton he looked at the register and found there was no train one of those days, but could not remember which day it was, the 13th or 14th, it might possibly have been the 15th.

Under these facts and upon the demurrer to the evidence, was the Baltimore and Ohio R. R. Co. liable for the loss of these potatoes? The liability of a common carrier at common law for the loss of or damage to goods received for carriage, from whatever cause arising, except the act of God or the public enemy, or the conduct of the owner of the goods, is settled, unless that loss or damage arises from the nature and inherent character of the property carried, such as the natural decay of perishable articles or the fermentation or evaporation of articles liable to these effects, or the natural and necessary wear of certain articles, or from defects in the vessels or packages in which they were put, or in the case of live stock where the loss arises from their own vitality, or where vicious and unruly animals injure or destroy themselves or each other, or starve themselves by refusing food or die of fright or heat, provided the common carrier has used foresight, diligence and care to avoid such damage and loss. *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen 533; *Clark v. Rochester and Syracuse R. R. Co.*, 14 N. Y. (4 Kernan) 571; *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61; *Conger v. Hudson River R. R. Co.*, 6 Duer. 375; *Hall and Co. v. Renfro*, 3 Metc. (Ky.) 53; *Maslin v. B. and O. R. R. Co.*, 14 W. Va. 180; *Friend, etc., v. Woods*, 6 Gratt. 189.

In the absence of a special contract it is the duty of the carrier of goods to transport them by the usual route proposed by him to the public and to deliver them within a reasonable time. When a carrier undertakes to convey goods, the law implies a contract, that they shall be carried and delivered at the place of destination safely and within a reasonable time. *The Empire Transportation Co. v.*

Wallace, 302; Vicksburg and Meridian R. R. Co. v. Ragsdale, 458; Denny v. New York Central R. R. Co., 15 Gray, 481.

It is claimed by the counsel for plaintiff in error, that the loss of the property in this case was occasioned by the act of God, and that the company is not liable. It has been determined, that "such an accident as could not happen by the intervention of man, as storms, lightning and tempests," (Lord Mansfield in *Forward v. Pittard*, 1 T. R. 27) "those losses that are occasioned by the violence of nature by that kind of force of the elements, which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind," (*Friend v. Wood*, 6 Gratt, 195) "an extraordinary convulsion of nature" (*Id.* 196); "a direct visitation of the elements, against which the aids of science and skill are of no avail" (*Id.* 196); "physical causes which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence prevent, such as loss by lightning, storms, inundations and earthquakes and the unknown dangers to navigation, which are suddenly produced by their violence" (*McCall v. Brock*, 5 Strobb. 119), are the acts of God or inevitable accidents. It seems to me, that freezing weather coming especially in that season of the year, when such weather may be expected, cannot be brought within the definitions above given of the act of God or inevitable accidents, which are in conformity with the definitions universally given of those phrases. *O'Conner v. Foster*, 10 Wall. 418; *Cooper v. Young*, 22 Ga. 272; *Sedgewick on Damages*, 357.

In the case of *O'Connor v. Foster* the defendant was sued for failure to transport grain from Pittsburgh to Philadelphia according to contract. The transportation was prevented by the freezing of the canal. The defendant was held liable to damages. The only question discussed was as to the measure of damages. It was not pretended that the freezing of the canal presented any excuse. Sergeant, Judge, in delivering the opinion of the court, says: "The defendants were bound by their contract to transport the wheat from Pittsburgh to Philadelphia, and have shown no legal excuse for refusing to do so. The question is, what is the measure of damages to be paid by a carrier for violating such a contract."

If the question in this case depended solely on the question whether the plaintiff in error was liable for the loss of the property from freezing, because that was an act of God, I should have no hesitation in saying that the liability existed. But on the other hand, if the question of liability rested simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, I would have as little hesitation in saying, that they were not liable; not because the freezing was an act of God or an inevitable accident, but because of the exception to that principle on account of the nature and inherent character of the property and

its liability to freeze. *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 189. But whenever the common carrier is exempt from liability, either because of the act of God or because of the nature and inherent character of the property and its liability to loss and damage, he must be free from any previous negligence and misconduct, by which that loss or damage may have been occasioned. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. *Williams et als., v. Grant et als.*, 16 Conn. 487.

That previous negligence or misconduct, which makes the carrier liable for loss to property, must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage, the carrier is not liable. He is answerable for the ordinary and proximate consequences of his negligence, and not for those that are remote and extraordinary, and this liability includes all those consequences, which may have arisen from the neglect to make provision for those dangers, which ordinary skill and foresight is bound to anticipate. *Morrison v. Davis & Co.*, 20 Pa. St. 171; *Denny v. New York Central R. R. Co.*, 13 Gray 481; *R. R. Co. v. Reeves*, 10 Wall. 176.

In the case of *Morrison v. Davis & Co.* the goods were injured by a flood. The evidence showed, that the canal boat, by which the goods were transported, was drawn by a lame horse. The result was that the boat did not make its usual speed. If it had, it would have passed the point, where the goods were injured, before the flood. It was held, that the carrier was not liable, because the lameness of the horse was the remote and not the proximate cause of the injury.

In *Denny v. New York Central R. R. Co.*, the goods were unnecessarily delayed on the way for six days at an intermediate point, and were then carried to their destination and placed in the depot of the company. It was held, that the company was liable for any injury resulting from the delay in transportation, but that it was not liable for the injury done by a flood after the goods were placed in the depot; that the delay was merely the remote cause of the injury by the flood.

On the other hand, in the case of *Smead v. Foord*, 1 El. and El. 602, the delay was in the delivery of a threshing machine with the knowledge on the part of the company, that it was needed to thresh wheat in the field. The grain was injured by rain, and during the delay had fallen in value. It was held, that the carrier was liable for the injury to the grain, but not for the fall in value.

The obligation of the common carrier is to transport the goods safely and within a reasonable time. What is a reasonable time is

not susceptible of being defined by any general rule; but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case. But it may be said, that the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining, whether in the particular case there has been an unreasonable delay. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 46 Miss. 458. It is obvious, that ordinarily the delay in shipping articles not liable to decay or damage, such as iron, wool, cotton, grains and things of like character not liable to be injured by a few days delay, would be no test in a case where the delay of a day in transportation would result in loss or damage by reason of their nature and inherent character, such as live-stock, fish, oysters, fruits, vegetables and things of like character. In the one case there is nothing in the thing itself, which would induce a prudent business man to anticipate injury from a temporary delay in transportation, whereas in the other case any prudent business man from the nature of the thing itself might reasonably anticipate loss or damage from delay. So the season of the year is an element to be considered, some articles, as some kinds of vegetables, being of that nature that at certain seasons of the year a brief delay would be harmless, whereas at another season of the year the delay would result in loss or damage.

The evidence in this case leaves it doubtful, whether the potatoes were delivered at the depot of the company on the 13th to be carried on the 14th, or whether they were delivered on the 14th to be carried on the 15th. The witness Murdock says in his testimony, that he "shipped to Thomas McGraw at Grafton fifteen barrels of potatoes on the 14th of February, 1866;" again he says, "fifteen barrels were shipped from Parkersburg to the said McGraw on the 14th of February, having been delivered to the Baltimore & Ohio R. R. Co. and the said company having receipted to the said Blackford for them." What Mr. Murdock means by "shipped," whether they left Parkersburg on the cars that day, or were delivered at the depot the preceding day previous to three o'clock p.m., to be transported the next day, or whether he meant they were delivered at the depot that day to be shipped the next, there is nothing to show. The dispatcher of trains states, that McGraw inquired for the potatoes on the 15th, but whether in the morning or evening he cannot remember. If in the morning, it was because he anticipated their shipment on the preceding day; for if they were shipped on that day, they could not arrive until nearly night. An engineer of the company stated, that there was no freight train on the 13th or the 14th, but which one of those days, he could not remember; that at the instance of the agent at Grafton he examined the register and found, that on one of those days there was no

lant undertook to carry flour for the appellee from Petersburg, Indiana, to New Orleans. It is claimed that the jury gave excessive damages and that the court admitted improper evidence both on the subject of damages and in impeachment of a witness.

A witness stated the value of a part of the flour at Petersburg, but excepting this the evidence on the subject was confined to values at New Orleans, and in its instructions the court charged the jury that the damages should be estimated from the proof of values at New Orleans. It is clear that the appellant was not harmed in the respect complained of by the evidence of the value of the flour at Petersburg.

In reference to the impeachment, the objection is urged that the time and place were not fixed with sufficient definiteness in the question put to the principal witness. The time and place as stated in the question were, "in June last, in Hazelton, Indiana." The witness admitted having had a conversation with and in the presence of the parties named, "at Hazelton in June last," but denied saying what was imputed to him. The impeaching witnesses testified to a conversation at the same time and place, and there can be no doubt that both witnesses spoke in reference to the same conversation concerning which the principal witness had been required to answer. There was therefore no error in this particular. *Bennett v. O'Byrn*, 23 Ind. 604; *Wilkerson v. Rush*, 57 Id. 172; *Lawler v. McPheeters*, 73 Id. 577.

There was sufficient evidence to support the finding of the jury in respect to the amount of damages, and we will not undertake to determine its credibility or relative weight.

Judgment affirmed.

When a common carrier fails to transport goods to the point of destination, the damages usually recoverable are the value of the goods at that point, with interest from the time they should have been delivered, less the amount of the freight. *Whitney v. R. R. Co.*, 27 Wisc. 327; *Chapman v. R. R. Co.*, 26 Wisc. 295; *Northern Transportation Co. v. McClary*, 66 Ill. 233; *Sturgess v. Bissell*, 46 N. Y. 462; *Gray v. Packet Co.*, 64 Mo. 47; *Perkins v. R. R. Co.*, 47 Me. 573; *Hackett v. R. R. Co.*, 35 N. H. 390; *O'Hanlon v. R. R. Co.*, 6 Bost. & S. 484.

M. E. POOLE

v.

HOUSTON & TEXAS CENTRAL R. R. CO.

(Advance Case, Texas. December, 1882.)

An attorney acting through fraud, and with the intention of defrauding a third party, cannot deny his liability for loss sustained by his wrong act, under his privileges as an attorney at law.

Nor can he deny his liability as an agent, for as such he is not justified in knowingly committing willful and premeditated fraud upon another.

In the absence of evidence showing that a railroad company had a general freight agent at the point in question, notice of stoppage of goods in transitu given to a station agent at the point of destination is sufficient notice to the company.

B. L. Aycock, for Poole.

Geo. Goldtwaite, for Railroad.

From Falls County.

Poole brought this suit January, 1875, against the railroad, J. L. Scott and L. LaPrelle & Bro. The latter were dismissed on the ground of insolvency.

The case as made, was, in effect, this: Poole, a merchant in Galveston, sold to LaPrelle & Bro., merchants at Marlin, thirteen cases of boots and shoes, November 23, 1874, on a credit of ninety days. On that and the next day the goods were shipped, and on the morning of the 25th Poole ascertained that the LaPrelles were insolvent, and he immediately telegraphed to his attorney at Marlin to stop the goods. The attorney immediately gave written notice to that effect to the station agent of the railroad at Marlin. The agent replied that the shipment would be protected. Subsequently the attorney informed the LaPrelles what had been done, and they told him to have the goods reshipped to Poole. Afterwards they assigned their bill of lading to Scott, their attorney, without consideration, and also gave him a written order on the station agent at Hearne, for the goods. With these, Scott obtained possession of the goods at Hearne, erased the name of LaPrelle & Bro. from the boxes, inserted that of J. L. Scott & Co., and reshipped the same on another bill of lading. The goods arrived at Marlin November 30, 1874, and were delivered to a drayman on his presenting the bill of lading of Scott & Co., and the goods were changed and delivered to LaPrelle & Bro.

Poole failed to recover possession of the goods, and brought suit for their value.

The case was tried April 5, 1876, and under the charge of the

court, the jury returned a verdict in favor of the defendants, and judgment accordingly.

Watts, Commissioner.—Adopted.

That part of the charge of the court regarding the liability of the appellee Scott, is objected to by appellant as erroneous. The evidence disclosed by the record unmistakably shows that after appellant had given notice to the station agent at Marlin of the stoppage of in transitu, the LaPrelles made a fraudulent assignment of the bill of lading to Scott, and at the same time gave him a written order on the station agent at Hearne for the goods. Armed with these Scott intercepted the shipment at Hearne, obtained possession of the goods, effaced from the boxes the name of LaPrelle & Bro., and inserted that of J. L. Scott & Co. (a bogus firm). He then shipped, by the same line, the goods to the bogus firm at Marlin, taking a bill of lading in that name. When the shipment arrived at Marlin, it was delivered to a drayman on his presenting to the agent the J. L. Scott & Co. bill of lading and was immediately delivered to the insolvent firm of LaPrelle & Bro., and thus defeated appellant in getting the rightful possession of his goods.

There is no pretense that Scott did not fully understand and comprehend the object and purpose of the fraudulent assignment of the bill of lading, his intercepting, reshipment, and delivery of the goods to LaPrelle & Bro. On the contrary, by his own evidence it is made to appear that the whole thing had been prearranged between him and the LaPrelles, for the object and with the purpose of defeating the appellant in getting the rightful possession of his own property. It is said by some of the witnesses that he was the attorney for and representing the LaPrelles.

1. Having assumed the apparent ownership of the goods, for the purpose and with the intention of consummating the fraud upon appellant, he will not be heard to deny his liability to appellant for the loss sustained by reason of his wrongful acts under privileges of an attorney at law, for such acts are entirely foreign to the duties of an attorney.

2. Neither will he be permitted, under such circumstances, to shield himself from liability on the ground that he was the agent of the LaPrelles, for no one is justified on that ground in knowingly committing willful and premeditated frauds upon another. In this particular the charge of the court was clearly erroneous.

The court also instructed the jury as follows: "If you find for the defendant, Scott, under the preceding instruction, then to hold the railroad liable, the evidence must show that the general freight agent of the company was notified not to deliver the goods to the purchaser, or that the agent from whom Scott obtained possession was so notified. Notice to the agent of the company at Marlin alone would not be sufficient under these circumstances, to charge the company, and you should find for both defendants."

This charge is also objected to as erroneous. There is no evidence in the record from which it might be inferred that the company had any such employee or officer as a "general freight agent," and it is not perceived upon what ground the court was authorized to take judicial knowledge of the existence of such an agent and the scope of his duties and powers. Certainly the statute does not name such agent, nor does it define his duties; and there is no general rule of law that requires that notices of this kind must be given to such an agent so as to bind the company.

When the station agent was informed not to deliver the goods to LaPrelle & Bro., he replied that the appellant would be protected in the shipment, thus holding himself out as an agent of the company with regard to freight, and in that department of its business he says that his duties as station agent are confined to that station and matters thereof. He was the agent of the company in regard to freights at that station. The record also shows that Marlin is the county seat of Falls County, being the place where this case was tried.

3. So in the absence of evidence showing that the company had another agent at that point, this station agent must be regarded as the agent representing the company in that county. Under the provisions of our statute, service of citation of a suit pending in the court of that county upon him constitutes service upon the company. (Revised Statutes, Art. 1223.)

As service of citation upon him is service upon the company in the most important suit that might be instituted in the courts of that county, it is not easily perceived why notice to him of stoppage in transit should not be held sufficient notice to the company where the consignment is made to that station, or the shipment made from it.

The fact that in the transaction of the business of a railroad company, the methods employed are extensive, and, to an outsider, complicated; their agents, employees and trains numerous, the scope, power and duties of such agents and employees, as well as the relative positions of such trains upon the line, are not supposed to be known to the citizen; and when he is called upon to act with reference to business transaction with such a complicated organization, the principles of justice and right ought not to require more of him than to give notice and apply to such agent or agents as are held out by the company as representing it in that department of business. The rule is elementary that where the principal holds out an agent in such a manner as to induce the public to believe that the agent is authorized to transact business of any particular kind, the principal will be bound for the acts of the agent in that particular. Here, the station agent was, to all appearances, held out to the public as the representative of the company at that point, in regard to freights, either shipped to or from that station,

and it would seem to follow that a notice to him of a stoppage in transitu of goods in transit to that point, upon the soundest principles of law and justice, ought to be considered as a notice to the company.

It is well known that railroad companies operate their own telegraph lines in connection with the business of their road. This is part of the history, and is common knowledge of the country, and authorized by the charters granted to the railroad companies. This evidences the fact that they have the means of ready communication with all the stations along the road; they are supposed to be informed of the movements of their various trains, the names, stations and duties of their agents. This being the case, it would be more consistent with right and reason to require the station agent at the point of destination, when informed of the stoppage in transitu, to give notice to the proper agents along the line of shipment of that fact, than to place upon the owner such a duty, as from the very nature of the case it would be next to impossible for him to accomplish. We conclude that the charge in this respect is erroneous.

The evidence disclosed by the record in regard to the delivery of the goods to Scott, at Hearne, the re-marking and shipping the same to Marlin, their delivery by the agent, notwithstanding the notice to him from the owner, when he was suspicious that they were Poole's goods, outside of the last question considered, should have been submitted to the jury as a question of good or bad faith upon the part of the agents of the company in that respect.

For the errors indicated, we are of the opinion that the judgment ought to be reversed, and the cause remanded.

SEPARATE OPINION OF JUSTICE BONNER.

Upon the question as to the proper party upon whom notice should be served, to be effective as a stoppage in transitu, the following is the general rule:

"In order to make the notice effectual, it must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody, at such time and under such circumstances that he may, with reasonable diligence, prevent the delivery of the goods to the purchaser or consignee." Edwards on Bailments, (2d Ed.) 487. Chitty on Carriers, (with Am. Notes) 163. Whitehead v. Anderson, 9 Mees. & Welsh, 433.

I have very serious doubt whether notice served, as in this case, on a mere local agent, at the point of destination, is effective as such, unless the goods should come into his possession in the regular line of transportation, either as originally consigned, or should thus come, when the bill of lading has been fraudulently changed, and of which fraud the agent had either notice in fact, or of such

circumstances as would be equivalent to notice; otherwise, the carrier might, without fault or negligence, be held responsible for the value of goods of which notice of stoppage in transitu had been given to one who had no power to interfere with or control their destination, and in regard to which the carrier, therefore, had no notice. The testimony in this case shows that the duties of the local agent to whom notice was given, "were confined to the business in and about the station only; that he had no control over anything except such as are under his immediate control."

The testimony, however, further shows—and it is upon this ground that I place my concurrence with the result reached, so far as the judgment against the company is concerned—that the goods, after they had been, by the grossest fraud, anticipated on the way, and the marks changed, and a new bill of lading taken in the name of a fictitious firm, subsequently came into the possession of this agent under such circumstances, as that he himself testified, that his suspicions were aroused that they were the same goods.

Nevertheless, without notice to the agents of the consignor, and who were almost at the door of the station, and without taking a bond of indemnity or other precaution whatever to protect the rights of the consignor, he permitted the goods to be carried into the possession of the original consignees.

ROGAN et al.

v.

AIKEN.

(Advance Case, Tennessee. September, 1882.)

The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer.

The bill alleged that a particular railroad, with all its property, effects and franchises, was sold under the proceedings by the State against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight:—*Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual. By statute the railroad companies of this State are given the exclusive privilege to carry freight and passengers over their respective roads, "provided that the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger." *Held*, that the intention of the legislature was to confer upon each company the right to charge, as

a common carrier, for freight and passengers carried over its road, or any part of it; that the intent was not to proportion the charges by any unit of distance, but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within the limit to the company subject to the rule of the common law; that the charges should be reasonable and to the regulating power of the courts and the legislature. A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and reasonable and not inconsistent with the public interest.

A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable.

COOPER, J.—The chancellor sustained a demurrer to this bill, and the complainants appealed.

On Feb. 27, 1852, the General Assembly of the State passed an act to charter the Rogersville and Jefferson R. R. Co. as a corporation. By the ninth section of the act, it was provided that said railroad company should be governed by the provisions of the Nashville and Chattanooga railroad charter, and should have the same rights and privileges, and be under the same penalties and restrictions as said company. By the 14th section of the act incorporating the Nashville and Chattanooga R. R. Co., it is provided that the charges for transportation on said road shall not exceed thirty-five (35) cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger. The Rogersville and Jefferson R. R. Co. was organized under its charter, and built a road from Rogersville to a point on the line of the East Tennessee, Virginia, and Georgia R. R., a distance of fifteen miles, which it equipped and operated for several years by carrying freight and passengers as a common carrier. It had, however, received State aid under the act of Feb. 11, 1852, and subsequent acts amendatory thereof, whereby a statutory lien or mortgage was created in favor of the State upon the entire road, stock, equipments, superstructure, franchises, and property of the company, as security for the bonds of the State issued to the company and the interest thereon. The company having failed to meet its obligations under the contract with the State, such proceedings were taken by the State against the company that, by order of court, the road, with all its property, effects, and franchises, was, on the 20th of March, 1872, sold to the East Tennessee and Virginia R. R. Co., and the sale was confirmed on Nov. 18, 1873. On Dec. 26, 1873, the purchaser sold and conveyed the road, with all its property, franchises, and privileges, to W. P. Elliott, and, on Sept. 12, 1877, Elliott sold and conveyed the same property to the defendant Aiken, who has since operated the road under the charter.

The complainants are merchants in Rogersville, engaged in buying and selling hardware, family groceries, produce, implements of husbandry, etc., and have been so carrying on business since the 1st of Jan., 1879. During this period they have been required by the defendant to pay as freight for articles carried on said road of fifteen miles from Rogersville to the East Tennessee and Virginia road from twenty to twenty-five cents per hundred pounds on heavy articles (no articles of measurement having been shipped to them), and have paid him accordingly, the gross amount of their payments aggregating about \$4000. The complainants insist that, under the charter of the company, the legal rate of freight for the length of said road would only be $5\frac{1}{2}$ cents per hundred pounds, and the main object of the bill is to recover the excess of payments over the legal rate of charge.

The bill further states that the defendant, as an inducement to other merchants in Lee County, Virginia, and Hancock County, Tennessee, to have their goods shipped to Rogersville so as to pass over his road, has entered into a contract with these merchants not to charge them exceeding fifteen cents per hundred pounds on any and all articles for carriage on his road, and that large shipments have accordingly been made over the road to these merchants. The complainants allege that this discrimination is illegal, and ask the court to enjoin the defendant from so discriminating.

The demurrer raises the questions whether the defendant is liable to the suit individually instead of the corporation, and whether the charges of freight and discrimination complained of are authorized by the charter of the Rogersville and Jefferson R. R. Co.

The bill alleges that the defendant is the owner of the road, operating it under the franchises of the charter of the Rogersville and Jefferson R. R. Co.; that he required the complainants to pay the rates of freight charged, and that the payments were made to him. It does not allege that the original corporation is in existence or running the road under its charter. The first ground of demurrer is, therefore, clearly bad, unless, as matter of law, the facts stated in relation to the sale of the road, with its property and franchises, under the decree of the court, and the subsequent sales by the purchaser to Elliott, and by Elliott to the defendant, made him a body politic, and corporate under the name and style of the Rogersville and Jefferson R. R. Co. But the several sales, according to the statements of the bill, were merely of the road, its property and franchises. The franchises thus sold would be such as appertain to the use of the property, and without which the road would be of little value. *Morgan and Louisiana*, 93 U. S. 217. The franchise to form a corporation and act in a corporate capacity means the power to charter a new corporation by appointing the corporators. Such a power is legislative and cannot be presumed from a mere authority to sell the property and franchises of an

existing corporation. *Myer v. Johnson*, 53 Ala. 237; *State v. Sherman*, 22 Ohio St. 428; *Smith v. Gower*, 2 Dur. 17; *Wilson v. Gains*, 2 Tenn. Ch. 602. The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. The franchise to be a corporation is not the subject of sale and transfer, unless by some positive provision of statute law, pointing out the mode in which the transfer may be made. *Hull v. Sullivan Ry. Co.*, 21 Law Rep. 138. If, in fact, there was a valid sale of the right to be a corporation, or if the defendant has become a body politic and corporate, it may be shown by proper pleading. The bill itself does not show that the defendant is acting otherwise than as an individual.

The second ground of demurrer raises the question as to the right of the defendant to demand and take from the complainant as freight on heavy articles from twenty to twenty-five cents per hundred pounds for carriage over the road, which is only fifteen miles long. The bill alleges that the defendant has been and is operating the road under the provisions of the charter of the Rogersville and Jefferson R. R. Co. In this view, the defendant is bound by the provisions of the charter. Those provisions are that the charges for transportation shall not exceed 35 cents per hundred pounds on heavy articles for every hundred miles. And the question is, whether the statute merely fixes a maximum charge for every hundred miles, leaving the company at liberty to establish the rates for shorter distances within the maximum, or establishes a rate for all distances. The statute which regulates the freight charges in this State is the act of 1845, Ch. 1, § 14, being the act chartering the Nashville and Chattanooga R. R. Co. That section confers upon the company the exclusive privilege to carry freight and passengers over the road, and adds: "Provided that the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents a mile for every passenger, and provided also, that the said company may, when they see fit, farm out their rights of transportation on said road, subject to the rate above mentioned." Looking to the general intent of the act incorporating a railroad company, and giving the language of the particular clause a reasonable construction, it can scarcely be doubted that the legislature intended to confer upon the company the right to charge, as a common carrier, for freight and passengers carried over the road, or any part of it. The rule in the construction of charters of incorporation unquestionably is, in case of ambiguity, to give the public the benefit of the doubt. *Barret v. Stockton Ry. Co.*, 2 Mon. and G. 134, 7 Id. 870; *Proprietors of the Stourbridge Canal v. Wheeley*, 2 B. & Ad. 793;

Carridew, etc., R. Co. v. Briggs, 22 N. J. L. 623. But the true rule in this as in all other cases is not to be astute in finding an ambiguity, and to give the language a fair construction, in the light of surrounding circumstances, to ascertain the legislative intent. If inclined to be literal, the court might say, although not contended for in argument, that there is no provision for a charge for freight at all except upon a hundred pounds for a hundred miles. But as this construction would be manifestly unjust for roads of over one hundred miles, would deprive all roads of less length of any right to freight whatever, and is not fairly deducible from the language used, it is clearly inadmissible.

The consideration for the statutory toll on freight, which a railroad company is authorized to take, is not merely the transportation over the road, but the services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading, and delivering the goods. *Pegler v. Monmouthshire R. & Canal Co.*, 6 C. & N. 644. And as these services, etc., are the same on like shipments for short as for long distances, it is obvious that the charge for short distances may be larger than for long distances, and yet reasonable. Accordingly, where the legislature has undertaken to regulate the details of the charges for carriage provision has generally been made for a higher charge for shorter distances. *State ex rel. v. M. & M. R. Co.*, 59 Ala. 321; *Texas Express Co. v. Texas, etc., R. Co.*, 6 Fed. Rep. 426. In Alabama, the additional charge is not exceeding 50 cents more than the rate charged for the same description of goods over the whole line of the road. The Texas statute allows railroad companies to charge and receive not exceeding the rate of 50 cents per hundred pounds, per hundred miles, for the transportation of freight, and when the distance is fifty miles or less the charge shall not exceed 80 cents per hundred pounds. The English Statutes make special provisions for short distances.

Railroad companies, as quasi public corporations exercising franchises granted in consideration of accommodations afforded the public, are required and may be compelled by the courts to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable. *Munn v. Illinois*, 94 U. S. 113, 133; *Chicago v. Iowa*, 94 U. S. 155; *Tierman v. Rinker*, 102 U. S. 125; *Reg. v. Grand Junction Co.*, 4 A. & El. 16. If only a maximum limit of charge be fixed by charter, the reasonableness of other charges within that limit may be tested in the courts. If the charge for each service be fixed by law, or if the intention of the legislature is clear to only allow certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract.

The statutory provision now under consideration starts out with

conferring upon each railroad company entitled to its benefits "the exclusive privilege to carry freight and passengers" over its roads. Each company thereby becomes a common carrier, presumably authorized to demand and receive reasonable compensation for the services which, as a common carrier, it is required to perform. This presumption is made a certainty by the following clause undertaking, although in very general language, to legislate in regard to those charges. Clearly, as we have seen, it was not intended to confine the right to charge the stipulated freight on heavy articles to the only case specified, namely on one hundred pounds for one hundred miles. The statute does not, therefore, fall in that class of legislation where the intention is to allow certain specified tolls, leaving all other cases of transportation unprovided for. In this view the statute was either intended to establish a rate for intermediate distances and weights in proportion to the amount specified, or to establish a maximum beyond which the company could not go, but within which it might make a tariff of charges dependent for its validity upon its being reasonable in any particular instance. The complainants contend for the first of these constructions, the defendant for the other. The language of the act, it will be noticed, will not in terms say that the charge for other distances and weights than those mentioned shall be at the same rate as the latter, nor does it, as in the case of a passenger, fix a unit of distance sufficiently small to afford a mode of measurement or proportion for other cases. If, too, we undertake to proportion the charge for short distances and smaller weights by the charge specified, we find that it leads to precisely the same result, where the road is less than a hundred miles, that the construction of the statute which we have discarded would lead to, namely, that to roads of a certain shortness, the road before us being a striking illustration, there would be no compensation for the services required to be performed. And even the proportion on long roads of small parcels, whether charged by weight or measurement, would be infinitesimal. Thus, the statute allows on one hundred pounds for one hundred miles 35 cents, and the proportion of charge on one pound for one hundred miles would be seven twentieths of one cent, and one pound for one mile the one hundredth part of seven twentieths of one cent. The charge for one hundred pounds on the whole length of defendant's road would be about five cents and for one pound five one-hundredths of one cent. It cannot be supposed that the legislature intended such a result, unless it has said so, or used language which fairly requires such a construction. In the absence of any words fixing a smaller unit, or indicating a proportion, the obvious and natural inference would be that the legislature had in mind only the unit of one hundred miles and one hundred pounds, and intended merely to designate a maximum of charge. The case of *Knox v. Railroad*

Co., 5 S. C. 22, so much relied on by the counsel of complainants, is not in conflict with these views. The statute of South Carolina, construed in that case, authorized the company to charge "for the transportation of goods by weight not exceeding 50 cents per hundred pounds per hundred miles." The court, whether correctly or not it is necessary to inquire, construed the language as plainly requiring that the charge for less than a hundred miles should be in the proportion of the charge for the distance specified in the statute. So, where a statute of Alabama provided that the company might "for transportation of local freight demand and receive not exceeding 50 cents more than the rate charged for the same description of freight over the whole line of the road," the Supreme Court of the State held that "rate" was the emphatic word of the sentence and was employed in the sense of proportion; and that the 50 cents allowed was in addition to the rate per mile of the charge over the whole road. *State ex rel. v. M. and M. R. Co.*, 59 Ala. 321; *M. and M. R. Co. v. Sturm*, 61 Ala. 589. Our statute is that the charge shall not exceed 35 cents per hundred pounds for every hundred miles." The courts of South Carolina and Alabama admitted the hardship of the construction of their statutes upon the railroad companies, but felt themselves constrained to adopt it because the language used showed a legislative intent that the charges should be proportioned. We are of opinion that no such intent appears in the language of our statute: that the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges, within that limit, to the companies, subject to the rule of the common law and the regulating power of the courts and the legislature. The second ground of demurrer is, therefore, well taken. The third ground of demurrer is, that the facts stated in the bill do not show a case of improper discrimination within the meaning of the franchises under which the defendant is operating his road. The facts are that the defendant, to induce merchants in Lee County, Va., and Hancock County, Tenn., to ship over his road, instead of taking a different route, has entered into a contract with them not to charge exceeding fifteen cents per hundred pounds on their goods. And the question is whether the defendant can make such a contract under the circumstances stated.

The English authorities hold that at common law the common carrier is not bound to carry at equal rates for all customers in like condition. The authorities are collected in *McDuffee v. Portland and Rochester Railroad*, 52 N. H. 430, and in 3 Am. and Eng. R. Cas. 602. In this country the courts have generally held otherwise, and that statutes prohibiting discrimination are merely declaratory of the common law. *Sinking Fund cases*, 99 U. S. 719; *Messenger v. Penn. R. Co.*, 36 N. J. L. 407, 531. Discrimination in rates of freight, if fair and reasonable and founded on grounds

consistent with the public interest, are allowable. *Hersh v. Northern, etc.*, R. Co., 74 Pa. St. 181; *Chicago, etc., R. Co. v. People*, 67 Ill. 11; *Fitchburg R. Co. v. Gage*, 12 Gray, 393. The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. Or, as said by Crompton, J., to the plaintiff, upon the trial of such a suit: "The charging another party too little is not charging you too much." *Gaston v. B. and E. R. Co.*, 1 B. and S. 112, 154, 165; *McDuffee v. Portland and Rochester Railroad*, 52 N. H. 430. In determining whether a company has given undue preference to a particular person the court may look to the interests of the company. *Ransome v. Eastern Counties Ry.*, 1 C. B. N. G. 437; 4 Id. 135. In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may nevertheless lower the charge of another person if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable. The bill contains no allegation that the charges made against and paid by the complainants were unreasonable. Without such an averment there has been no damage. The third ground of demurrer was, therefore, well taken.

Affirm the decree with costs.

See note, 5 Am. and Eng. R. R. Cas. 245.

McKINNEY

v.

JEWETT.

(Advances Case, New York. 1882.)

The liability of a common carrier in the absence of special contract or proven custom, is that of an insurer until delivery, or what is tantamount to delivery. Such liability remains until either the property transported is actually delivered at its destination, or notice is given to the consignee to remove it, and the expiration of a reasonable time for such removal.

The terms of a bill of lading will not be construed to exempt a carrier from liability for negligence, unless there be an express stipulation to that effect.

The bill of lading for certain hams forwarded by a railroad company provided that the company should be liable only as warehousemen while the goods were "at any of their stations awaiting delivery." It also required all goods to be removed from the cars "during business hours." The hams arrived in good time on Thursday at the point of destination, and were allowed to remain locked up in a car. The consignee inquired for them on Thursday and Friday, but was told they had not arrived. On Saturday, at 5.30 p. m., the company informed the consignee of their arrival. On Monday morning the consignee removed them, when they were found to have been damaged by the heat and detention. In an action by the consignee against the company to recover damages for the loss,

Held, that the company was not exempted from liability by the terms of the bill of lading.

FINCH, J.—The defence in this case was rested mainly upon the terms of the shipping bill or receipt. That provided in substance that the carriers should not be liable as such while the goods were "at any of their stations awaiting delivery" to the consignee, and that during such period the carriers should be liable only as warehousemen. The property transported was a quantity of hams, shipped at Chicago, and reaching Binghamton, which was the point of delivery, in due season, and within the ordinary time. They arrived on Thursday. No notice of their arrival was given to the consignee. The latter, through their cartman, inquired on Thursday and on Friday for the hams, and he was told at the freight office of defendant that they had not arrived. As matter of fact they were then in a car which had arrived on Thursday, and which stood on a side track a short distance from the depot. On Saturday afternoon, at about half-past five o'clock, notice of the arrival for the first time reached the plaintiff. The same shipping bill required freight to be removed from the cars "during business hours." The plaintiff, assuming that no time remained in which to remove their freight during what remained of the business hours of that day, waited over Sunday, and unloaded their

hams on Monday, when they were found to have been seriously injured by the heat and the delay.

The terms of the shipping bill did not release the carrier from liability for negligence. *Nicholas v. N. Y. C. and H. R. R. Co.*, 15 W. D. 20. In the absence of such an express and definite stipulation, it is not to be argued out from language which conceals, if it contains it. Such exemption, however, is not claimed by the carrier, but rather that his responsibility was lessened though not destroyed. His liability, in the absence of special contract or proven custom, made him insurer until delivery, or what was deemed tantamount to delivery. It remained until either the property transported was actually delivered at its destination, or until notice was given to the consignee, and the expiration of a reasonable time for its removal. *Fenner v. B. and State Line R. R. Co.*, 44 N. Y. 511; *Zinn v. N. J. Stm't. Co.*, 49 N. Y. 442; *McAndrews v. Whitlock*, 52 N. Y. 40; *Gleadell v. Thompson*, 56 N. Y. 194. This common law liability it was evidently the design of the contract in some degree to lessen, and that was sought to be done by substituting the milder responsibility of a warehouseman, while the property, though arrived, was "awaiting delivery." The defendant construes this stipulation to mean that from the moment of the arrival of the hams his liability as carrier ended, and from that time until the delivery on the following Monday he was responsible only as warehouseman. If that were so, it would not excuse his negligence. But certainly property cannot be said to be "awaiting delivery" when its arrival is not only not announced, but actually denied; when its delivery is refused, and it is negligently withheld from the possession of the consignee. That was the case as to the car load of hams, from their arrival on Thursday until at least the notice given on Saturday afternoon. It is to be observed that the stipulation depends upon two conditions. The property must be not only "at the station," but also "awaiting delivery." This implies not only the arrival, but the completion of whatever, on the part of the carrier, is necessary to be done to leave the risk of further delay upon the consignee. The goods are "awaiting delivery" only after the duty of the carrier is done, and he is entitled to remain passive "awaiting" the action of the consignee.

But did the carrier's responsibility change on Saturday? The shipping bill provided that goods must be removed "during business hours." Suppose the notice is given during the last five minutes of business hours on Saturday, and the cars and office remained closed until Monday morning. It is very clear that such notice, if a technical, is not a real and substantial performance of the condition. The notice in this case, as the jury found, came too late for the removal of the property on Saturday. The next day was Sunday. Practically, the notice given at so late an hour

amounted to saying this to the consignee: Your hams have arrived, but, under our rules, you cannot have them until Monday. Could they be said to be "awaiting delivery," when they were kept locked in the cars, and could not be removed with ordinary effort until Monday; and that, through no fault of the consignee, but solely because of the carrier's own regulations? We think not.

It is said this construction nullifies the provision of the contract, and leaves it nothing upon which to operate; that it must have some force, and it gets none if the common law liability remains unaffected. That rule properly applies only where two reasonable constructions are possible, and choice is to be made between them. In such event the law prefers the construction which gives the language effect. But no rule authorizes us to pervert the fair meaning of words, and to substitute for something that is said what is not said at all. We do not think the language of this shipping bill is doubtful or ambiguous. It means, as we have stated, that after the goods have arrived, and the carrier has given notice to the consignee, at a time which furnishes reasonable opportunity for him to get them, then the carrier's responsibility as such ends; and then, and not until then, are the goods "awaiting" delivery. It is true, therefore, that the stipulation has little or no effect upon the character of the common law liability. It is possible that it has some, although very narrow and slight. The general rule holds the carrier as such until the end of a reasonable time for removal. It is possible that our construction would close his liability as carrier at the beginning of such reasonable time after notice. But we need not decide that here, for no facts in the case call for its determination.

And that is the answer also to the further contention, that the trial court denied even this slender effect to the stipulation, and imposed the full common law liability. That is true, but we cannot see how it was at all material. There was no pretence that any of the injury to the hams occurred after the commencement of business hours on Monday morning. What the liability of the defendant was after that moment was of no consequence, and nothing in the case required its determination. The injury happened while the defendant was liable as carrier, and the learned judge was right in so declaring.

The other questions in the case are not important, and furnish no ground for reversal. The judgment should be affirmed with costs.

"All concur, except Rapallo and Tracy, JJ., absent."

See Note 7 Am. & Eng. R. R. Cas. 404.

See Notes on Clauses in Bill of Lading, limiting liability, *infra*.

MEMPHIS AND LITTLE ROCK, ETC., R. R. CO., AS REORGANIZED,
v.
C. M. FREED.

(38 *Arkansas Reports*, 614. 1882).

F., a merchant at Dardanelle, ordered goods of W. B. & Co., merchants at St. Louis. They sent the order to L. A. & Co., merchants at New Orleans, with directions to ship the goods to F. at Dardanelle, and send them the bill and bill of lading. L. A. & Co. filled the order, shipped the goods to F., and sent the bill and bill of lading to W. B. & Co., and charged the goods to them, and they charged them to F. During the transit W. B. & Co. failed, and L. A. & Co., claiming the right of stoppage in transitu, demanded the goods of the M. & L. R. R. Co., who were transporting them to F., and the company delivered them up to them. F. then sued the company for the value of the goods. *Held*, that L. A. & Co. were not the vendors of F.; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to F. for their value.

Upon the consignment of goods the title becomes vested in the consignee, absolutely and against all the world, subject only to the carrier's lien for freight, and the consignor's right of stoppage in transitu upon the consignee's insolvency.

APPEAL from Pulaski Circuit Court.

Hon. J. W. Martin, Circuit Judge.

Freed, a merchant at Dardanelle, ordered of Walker Bros. & Co., merchants at St. Louis and Memphis, a bill of dry goods. Walker Bros. & Co. transmitted the order to Lehman, Abrahams & Co., merchants at New Orleans, with directions to ship the goods to Freed, at Dardanelle, and send the invoice and bill of lading to them. Lehman, Abrahams & Co. filled the order, and shipped the goods to Freed by way of Hopefield; charged them to Walker Bros. & Co., and sent the invoice and bill of lading to them, and they charged the goods to Freed.

At Hopefield the goods were delivered to the defendant company, to be transported on their road to Argenta, and thence to be forwarded to Freed, at Dardanelle. While the goods were in transit from New Orleans, Walker Bros. & Co. failed, and Lehman, Abrahams & Co., claiming the right of stoppage in transitu, demanded the goods from the defendant company, and they were delivered to them.

Freed then sued the company for the value of the goods, for not delivering them as contracted in their bill of lading.

Upon the trial, the defendant objected to the introduction of the following testimony of Freed: "That early in October, 1879, he sent an order to Walker Bros. & Co., of St. Louis, Mo., to send him some sheeting and yarn, which were the same mentioned in the complaint, and the same were charged to him by Walker

Bros. & Co. That the following was a copy of a letter sent by Lehman, Abrahams & Co., of New Orleans, to Walker Bros. & Co., to wit:

NEW ORLEANS, LA., Oct. 28, 1879.

Messrs. Walker Bros. & Co., St. Louis:

SIRS:—We enclose bill of lading and invoice of goods shipped to C. M. Freed, as per your instructions, amounting to \$507.44, for which please credit our account. We shipped the goods via Hopetield.

Yours truly,

LEHMAN, ABRAHAMS & Co.

The objection to this testimony was overruled, and after other testimony, showing the facts above stated, there was a verdict for the plaintiff, and from final judgment the defendant appealed.

Colin & Colin, for appellant.

First.—The testimony of Freed was irrelevant and immaterial, and comes within the rule *res inter alios acta*, etc. Freed, so far as the rights of L. A. & Co. could be affected, occupied the position of a representative, receiver or agent of W. Bros. & Co., and was not bound as a purchaser to L. A. & Co. *Benj. on Sales*, 1st Eng. Ed. p. 352; *Hardiman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105. No sale is binding unless the buyer not only accepts, but receives the goods. (*Benj. on Sales*, *passim*). Freed had not paid for the goods, and can in no way be prejudiced by the exercise of the right of stoppage. See generally authorities cited *supra*, and *Smith's L. C. (H. & W. Am. notes)*, p. 892, vol. 1, and p. 1195, 7th Am. Ed.; also p. 1219 *Ibid*.

Second.—The case in 12 Pick. 307, is not applicable, for there was a complete delivery in contemplation of all parties. But it shows that the right of stoppage is a quasi-lien, and such a lien L. A. & Co. had as vendors. *Benj. on Sales*, 1st Eng. Ed. p. 695; *Oppenheim v. Russell*, B. & P. 42.

Freed, though named as such, was not the consignee of L. A. & Co., but W. Bros. & Co. were. He could sue on the bill of lading. *Sec. 589, Story on Bailm.* 8th Ed.; *G. W. R. R. v. McComas*, 33 Ills. 185; so could the consignor, *Hooper v. Chicago*, etc., 27 Wis. 81; *Blanchard v. Page*, 8 Gray, Mass. 281; *So. Ex. Co. v. Craft*, 49 Miss. 480; 44 Ala. 101; 49 N. Y. 188; 19 N. H. 337; *Story on Bailm.*, 8th Ed., sec. 589, and so could any person in interest. *Wells on Res. Adjudicata*, secs. 67, 64, 74 and 16, and Code. Hence, because a person is entitled to sue, and is consignee, is not the criterion whether the vendor may exercise the right. This shows that it is not essential, in all cases, that the person named as consignee in the bill of lading must be insolvent. The insolvency of the vendee is the criterion, and not of some

sub-vendee, or consignee. In *Re Golding, Davis & Co. v. Knight & Son*, 42 L. T. Rep. N. S. 270; *Houston on Stoppage, etc.*, ch. 1; *Benj. on Sales*, ch. 5; *Smith L. C.* p. 217, 7th Ed.

Freed was not a bona fide purchaser for a valuable consideration; he was not a purchaser at all; he paid no value; he received no bill of lading. *W. Bros. & Co.* were the purchasers, and on their insolvency the right attached.

9 Heisk (Tenn.) 388 and *Eaton v. Cook*, 23 Vt. 60, are not applicable. In the former there had been complete delivery, etc., and in the latter there was no sale on credit.

Third.—Vendee sells subject to vendor's right of stoppage. *Dixon v. Yates*, 5 B. & A. 313; *Jenkins v. Osborne*, 8 Scott, N. R. 505; 7 M. & G. 678.

B. C. Brown, also for appellant.

1. Freed is in no way damaged—avers no special damages. He has not paid for the goods, nor is he liable to *W. Bros. & Co.* until he does receive them. There is no privity between him and *L. A. & Co.* They made no contract with him, had sold him nothing, and were under no obligation to deliver goods to him; consequently there was no privity between Freed and the defendant carrier. Privity arises from mutuality of obligation. The carrier was the agent of *L. A. & Co.*, and they had the right to countermand and revoke their orders to their agent.

The order from Freed to *W. Bros. & Co.* is *res inter alios acta*. The right of stoppage exists so long as the transitus exists, and the transitus is not at an end until the goods have reached the place named by the buyer, to the seller, as the place of destination. *Benj. on Sales*, 1st Ed. 643. The vendor has the right to re-take the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession of, and keep the goods for him. *Ib.* 635.

2. The true and only criterion of the right, is the insolvency of the purchaser. It is based: 1st, Sale on credit; 2d, Insolvency of the purchaser; and 3d, That the goods have not reached the purchaser or his agent, or the place of destination; but are still in the possession of the carrier qua carrier. *Ib.* 627; *Hutchison on Carriers*, 409; *Reynolds v. Boston, etc.*, R. R. 43 N. H. 580. All these circumstances are found here. The fact that the purchaser named Freed to receive the goods cannot alter the principle on which stoppage is based, that "one man's goods shall not be appropriated to payment of another man's debts." Cites *Ex parte Golding*, supra, and *Mohr v. B. & A. R. R.*, 106 Mass. 107.

J. M. Moore, for appellee.

The right can only be exercised between vendor and vendee, and during the transit from vendor to vendee. *L. A. & Co.* were the vendors, and *W. Bros. & Co.* their vendees, and the goods were delivered to the carrier for shipment to a different destination; it

was not contemplated that they should ever reach the possession of W. Bros. & Co. The bill of lading was in name of appellee. Every circumstance concurred to defeat the right. See *Eaton v. Cook*, 32 Vt. 58; *Rowley v. Bigelow*, 12 Pick. 313; *Stubbs v. Lund*, 7 Mass. 453; *Noble v. Adams*, 7 Taunton, 59. Delivery of goods to carrier is a constructive delivery to the consignee, and sufficient to pass title. *Crumbacker v. Tucker & Hamilton*, 9 Ark. 370; *Magruder & Bro. v. Gage*, 33 Md. 334.

When the relation of vendor and vendee exists, the delivery is subject to the right of stoppage in transitu in the vendor qua vendor. Benjamin on Sales, sec. 832; 1 Smith, L. C., 5th Am. Ed., 874-5, 908.

Appellee was neither the vendee nor sub-vendee of L. A. & Co., and hence no right existed in them.

EAKIN, J.—There was no error in admitting the testimony of plaintiff, Freed, to show that he had ordered the goods from Walker Bros. & Co. The right of stoppage in transitu does not arise from any contract between the parties. It is a commercial right, arising from the circumstances; and it is competent to show the facts. The fact intended to be shown by this testimony was, that the plaintiff, Freed, to whom the goods were shipped, was the real owner, by purchase from Walker Bros. & Co., and that the goods were not shipped to him, as the agent of Walker Bros. & Co., who ordered them from the New Orleans firm, and directed them to be sent to Freed at Dardanelle; but that the goods, if they had come to his possession, would have been received by him, not as the goods of Walker Bros. & Co., but as his own. In other words, it tended to show that the relation of vendor and vendee did not exist between him and the consignors, but between him and the firm of Walker Bros. & Co.; and that there was never any consignment, or transitu of the goods to the original purchasers, either in their own names, or to them in his name as agent. If he had really been the agent of Walker Bros. & Co., or under any obligations to receive the goods for them, the right of Lehman, Abrahams & Co., the consignors, to stop them in transitu could not be doubted; but, as he had never had any transactions with Lehman, Abrahams & Co., and had never represented himself to them as the agent of the purchasers; and as he had made himself responsible to Walker Bros. & Co., and would have received the goods absolutely as his own property, in his own right, if they had not been intercepted, then it becomes a grave question whether or not the right of stoppage in transitu ever existed at all; or, if it existed, whether it should not be considered as existing in Walker Bros. & Co., the real vendors to Freed, upon his insolvency, if it had occurred. It was proper to bring before the Court all the facts showing the actual status or condition of things, that it might determine

the rights of the parties, within the scope to which the doctrine of stoppage in transitu extends. To such cases the prohibition against showing *res inter alios acta* does not always apply.

The true state of the case, as developed by the record, is simply this: Lehman, Abrahams & Co., upon the request of Walker Bros. & Co., and taking them as paymasters, shipped goods to Freed, at a point distant from the business place of either. It was never contemplated, from anything that appears, that the goods were intended to reach Walker Bros. & Co., or their agents, or to come into their possession. The fact is, they were not; and there is nothing from which the shippers might fairly have presumed an intention on the part of Walker Bros. & Co. to take control of them at their destination, or retain any property in them. Freed remains solvent. Walker Bros. & Co. became insolvent, and the goods were redelivered, by the carrier, to Lehman, Abrahams & Co., before they came to Freed's possession.

Is the carrier responsible to Freed for that? The goods became his property, on consignment absolutely and against all the world, subject only to the carrier's lien for freights; which, under the circumstances, it would have been idle to tender; and any right of stoppage in transitu which might exist. Had Lehman, Abrahams & Co. that right? If not, the action of the court is correct. If they had, it must be reversed.

In the present condition of commerce, it is not uncommon, as in this case, for purchasers to direct their vendors to consign the articles to customers of the former, with whom the shippers have no privity whatever.

The distinction between vendor and consignor and vendee and consignee, sometimes lost sight of in the old cases, has thus become a matter of vast importance in these triangular transactions; and, there being only one transit, it is a weighty matter to determine who, during that transit, has the right of stoppage, and upon whose insolvency; whether, in this case, it would have been in Walker Bros. & Co., or in Lehman, Abrahams & Co., on the insolvency of the consignee Freed, if in either. It could not have been in both; for that would produce an unseemly conflict. If in Lehman, Abrahams & Co., the contingency has not arisen; for Freed is not insolvent. If in Walker Bros. & Co., upon what principle can it, on their insolvency, arise in favor of the New Orleans consignors, against the solvent vendee of Walker Bros. & Co.? If in neither, in case of Freed's insolvency, but only in Lehman, Abrahams & Co., in the contingency of the insolvency of Walker Bros. & Co., then we have the case presented of a solvent consignee, ready and willing to pay for his goods, subject to have them taken upon the default of a party for whom he is not liable, and whose actions he cannot control. If more attention had been paid in the discussions to the distinction between consignee and vendee, and

consignor and vendor, the decisions would have cast on this point more light than we now have.

A review of the authorities shows that the right has never been applied in cases where the consignor claiming it has not been the vendor, and the consignee (upon whose insolvency it arises) the purchaser and debtor. Lord Chancellor Baron Eyre remarked, in *Kinloch et al. v. Craig*, in 1790 (3 Term Rep., p. 787), that the right never occurred, but as between vendor and vendee.

It will simplify the matter to bear in mind when the terms "consignor" and "consignee" are used, that by the former is meant a vendor who ships, and by the latter, a purchaser to whom they have been sent. It is the real interest on one side and liability on the other which gives the right; not the technical designation of the parties in the bill of lading. (See notes to case of *Lickbarron v. Mason*, *Smith's Leading Cases*, Vol. I., p. 901.)

It is equally clear from all the cases, that the right has never been exercised, save upon the transit of the goods from a vendor to the purchaser from him.

Freed bought the goods from Walker Bros. & Co. They were his vendors and to them only was he liable. There can be no doubt that if the goods had taken their natural course, and been shipped by the original owners to Walker Bros. & Co., their vendees, the right of stoppage would have attached against the latter, upon their insolvency; and the goods might have been reclaimed during that transit. But if they had reached Walker Bros. & Co., and been by them reshipped to Freed at Dardanelle, it is equally clear that the original vendors would, on that transit, have had no right of stoppage, in any event; but it would have been in Walker Bros. & Co., upon the contingency of Freed's insolvency. Quite as clearly, Freed never contemplated, nor can be presumed to have assented to any other or different right of stoppage of the goods, than in case of his own insolvency, on the transit from his vendors to himself.

Neither transit was used. By agreement between Walker Bros. & Co. and the original vendors, another was adopted, which contemplated that the goods should come to the possession of the vendee of Walker Bros. & Co. without ever reaching Walker Bros. & Co. at all. This was before any shipment, and before Lehman, Abrahams & Co. had parted with possession. It is not like a sale by a purchaser of goods on their transit to himself; because, when the vendor contemplates a transit to his purchaser, and ships accordingly, he cannot be defeated of his right by the conduct of the purchaser during the transit, without his assent, either express or implied, in case of the assignment of the bill of lading. Here he assents to a different destination before parting with his property; and if he thereby loses his right of stoppage, it is his voluntary act.

A case very nearly in point, as to the rights of parties in this case, is that of *Feise et al. v. Wray*, 3 East. 93. Browne, a London trader, ordered of Fritzing, a Hamburg merchant, a quantity of beeswax. Not having it, Fritzing procured the wax from another merchant, a stranger to Browne (having with him no privity of contract), and shipped it to Browne, upon the latter's account and risk, drawing bills upon him for the purchase money. Upon the insolvency of Browne, Fritzing, by his agent, stopped the goods in transitu. The assignees in bankruptcy of Browne brought trover.

In his opinion, Mr. J. Grose remarked, after stating the prominent facts: "There was no privity between Browne and the merchant of whom the wax was purchased." "What is this, then, but the plain and common case of the consignor of goods, who has not received payment for them, stopping them in transitu, before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal, merely, I should find great difficulty in saying that it did. But here, Fritzing may in reality be considered as the vendor; for the name of the original owner was never made known to the bankrupt, but the goods were purchased and the bills drawn in Fritzing's own name; and therefore he stands in the relation of vendor as to Browne."

Lawrence, J., alluded to the argument that the right of stoppage applied solely to the case of vendor and vendee; from which it was contended that Browne must be considered as the principal for whom the goods were originally bought, and that Fritzing was only the factor, or agent; the Hamburg merchant furnishing the beeswax being, in fact, the vendor of the bankrupt; and that there was no right of stoppage in Fritzing. He says: "If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to merchants here from their correspondents abroad, to purchase and ship certain merchandise to them. The merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But at any rate, this is a case between vendor and vendee; for there was no privity between the original owner of the wax and the bankrupt; but the property may be considered as having been first purchased by Fritzing, and again sold to Browne at the first price, with the addition of his commission upon it. He then became the vendor, as to Browne, and consequently had a right to stop the goods in transitu."

Le Blanc, J., puts the case in this wise: "The situation of Frit-

zing was that of being employed by Browne to purchase the goods abroad, and to send them to him here. For the purpose, then, of stopping the goods in transitu, they stood in the relative situation of vendor and vendee; though, perhaps, not so as for all purposes. Fritzing pledged his own credit in the purchase of the goods from the original owners; and Browne could not be called upon for the value by the original owners, unless the goods came to his hands and he had not paid or accounted for the value of them to Fritzing, with whom he dealt. Then, clearly, Fritzing had a right to stop them in transitu." And so all the Justices agreed.

I have cited the different expressions of the justices in that case in order to show the true grounds of their conclusion, and that the differences in the facts between that case and this would not have been considered material. There the original vendor was not advised of the name of the ultimate purchaser, for whom the goods were intended; but that is mentioned only as conclusive proof of want of privity of contract, and it was upon this want of privity between the original vendor and ultimate purchaser, that the right of stoppage in transitu was to be in Fritzing, the immediate vendor of Browne. In the case in judgment, the want of privity between Lehman, Abrahams & Co. and Freed, is even more marked than if they had not known Freed's name.

The goods were sold on the order and sole credit of Walker Bros. & Co.; the bills made out in their name, and at their request sent to them with the bills of lading.

The vendors need not have inquired nor known anything of Freed. He was nothing to them, nor they to him. The goods were put in a carrier's hands, directed to him, simply as a mode of disposition of them, directed by the purchasers.

In the American Notes to Smith's Leading Cases (*ubi supra*) it is said: "It is not necessary, however, in order to support the right of stoppage in transitu, that the consignor should be the original owner of the goods, or have purchased them on his own account. Although acting as an agent for a commission, and with the view of paying for them ultimately, with funds derived from the consignee, still, if he have obtained them on his own risk and credit, he will be entitled to stop them in transitu, on the insolvency of the latter," citing American cases, and also *Jenkyns v. Usborne*, 7 Man. & G. 678.

In view of these principles, I think it plain that if Freed had himself become bankrupt upon the transit of the goods from New Orleans to Dardanelle, there would have been no right of stoppage in Lehman, Abrahams & Co., as there would be in Walker Bros. & Co., notwithstanding the goods had been shipped from New Orleans, they being the true owners and vendors as regards Freed; we may safely take this standpoint, and consider from it whether or not the former firm, by agreeing to consign upon a transit, bur-

dened with a right of stoppage in behalf of Walker Bros. & Co. upon one contingency, can claim for themselves a right of stoppage in another; to wit: the insolvency of Walker Bros. & Co. I have never heard of any case which held that the same goods, or the same transit might be subjected to two conflicting rights of stoppage upon different contingencies.

I think it would result that no right of stoppage as to these goods remained in Lehman, Abrahams & Co. in any event.

Although the contingency upon which they claim that their right arises, is the insolvency of Walker Bros. & Co., it is not immediately against them, or to prevent the goods reaching them, that its exercise is attempted. It is to prevent the goods from reaching Freed, who does not stand in the position of a purchaser, during transit, but of one who has been accepted by Lehman, Abrahams & Co. before shipment, as the person entitled to receive them, as owner, and not as their vendee. There is nothing in the record to bring this case within the class where the purchaser designates a place of delivery different from his own place of business, for if to be delivered for him, or to his use, at any named place, the right of stoppage remains until he receives them.

Even upon the supposition that Freed has not paid Walker Bros. & Co. for the goods, and might defend a suit against him by pleading this stoppage—a point not necessary to decide—this would then resolve itself into an effort on the part of Lehman, Abrahams & Co. to secure a preference over other creditors of Walker Bros. & Co. by diverting to themselves the value in goods of so much of the assets of the latter firm as consists of Freed's debt. If they had such right to save themselves upon a plank of the shipwreck, there was certainly a counter right on the part of Freed to receive his goods and pay for them to whoever might be entitled. He is solvent, and may, in the absence of proof to the contrary, be considered willing to pay for the goods in full. I think it would be difficult, amongst all the cases, to find one where the right of stoppage in transitu has been used to defeat the owner and consignee of goods of their possession, without any default of his own. It cannot be presumed to be a matter of indifference to Freed, whether he shall take his goods and pay for them, or lose them and be excused, and the carrier had no right to decide this for him, and restore the goods to Lehman, Abrahams & Co.

A leading case in America upon this point is that of *Stubbs v. Lund*, 7 Mass. 453. Chief Justice Parsons upon the facts in that case, which, however, are not analogous to these, remarked upon the general principle, that the true distinction governing the right of stoppage in transitu, is this: "Whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bill of lading. When such actual possession after the termination of the voyage is so provided for,

then the right of stoppage in transitu remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stoppage in transitu remains after the shipment. But if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stoppage in transitu ceases upon the shipment, the transit being then completed, because no other actual possession of the goods by the consignees is provided for in the bill of lading which expresses the terms of the shipment."

These remarks are applicable to the case in judgment this far: That, here, the goods were not purchased by Walker Bros. & Co., to be imported by them to St. Louis or Memphis, where their business houses were, and no possession by them was ever contemplated; but they were put upon a steamer, by their directions, and with the assent of the vendors, to be transferred from the place of shipment to Dardanelle, in Arkansas; which, as to commercial matters, "may be considered a foreign market." In further illustration, he says: "If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons, or freight, to be transported to a foreign market, as the mercantile adventures of different shippers; if goods are so shipped by the several consignors, there is no transit to the consignees after shipment, and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship, on their own credit and risk; for a future actual possession by them is provided for in the bills of lading."

The subsequent case of *Eaton et als. v. Cook*, 32 Vt. 58, seems essentially in point. The plaintiffs, Eaton and others, hardware merchants of Boston, sold and shipped goods to Cooke, in Vermont, upon the order and credit of Barnes & Brothers, a firm with which they had dealings. They gave Cooke a receipt for the bill, as paid by the order of Barnes & Bros., and charged them up to the latter firm. During the transit Barnes & Bros. failed, and the firm of Eaton & Co. demanded the goods of a depot agent, before they reached their destination. He delivered them, however, to Cooke, upon being indemnified, and Eaton et als. brought trover. The judgment below was for Cooke, which, on appeal, was affirmed.

The court held, 1st, That if the matter were to be viewed as a sale directly from Eaton & Co. to Cooke, there was no credit, and consequently no right of stoppage. 2d. Viewed as a sale to Barnes & Bros., and a re-sale by them to Cooke, the right of stoppage could not be maintained. For if the vendors knew that the purchase was for the purpose of a re-sale, or consented to it, they were bound by the new destination as a final and irrevocable delivery; and 3d. The opinion says: "If we attempt to make it a sale to Barnes & Bros., and to find a journey, or transit, there was, in

fact, nothing of the kind contemplated, so far as the vendees were concerned;" and added, "upon the delivery to the carrier, it had effectually come to the possession of Barnes & Bros., as much as ever it was contemplated it would come;" and that "this is expressly recognized in numerous cases."

These conclusions commend themselves to us as obvious and sound, and we think they apply with equal force to this case.

We have carefully considered a report of the case of *Ex parte* Golding, Davis & Co., in the Court of Appeals in Bankruptcy in England, published in "The Law Times," of May 8th, 1880, which has been strongly pressed as authority per contra, by the counsel for appellant. The report is not very intelligible, as published in the Times, but it seems to have the bearing claimed by counsel. However that may be, we are of opinion that the weight of authority is with the Vermont case above cited, and we are disposed to follow that. We think the firm of Lehman, Abrahams & Co. had not the right to stop the goods in transitu, and that the verdict was properly for the plaintiff.

Affirm.

See note, 6 Am. and Eng. R. R. Cas. 375.

ST. LOUIS, I. M. AND S. RY. CO.

v.

HECHT, Survg. Part.

(33 *Arkansas Reports*, 357. 1882.)

In an action for the destruction of property the allegation of ownership in the plaintiff is material, and a failure to deny it in the answer is an admission of its truth.

When modifications to instructions are excepted to the bill of exceptions must show the modification, and what the instructions are, as amended; otherwise this court cannot tell whether they are right or wrong.

A railroad company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train, and main track, unless damages to the property of others are apparent, and the probable result; but if in doing so they stop them near the property of another and it is consumed, they are liable for the injury if by proper care under all the circumstances it could have been avoided.

Though a burning railroad car which is run off on a switch to save the train and main track is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents, or employees, having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employees of the owner in other

business not connected with the property are under no legal obligation to protect it, and their omission to do so is not contributory negligence on the part of the owner.

APPEAL from Clay Circuit Court.

Hon. L. L. Mack, Circuit Judge.

Geo. H. Benton, for appellant.

1. Plaintiff failed to prove ownership of the spokes. The allegation of ownership is not such an allegation as the statute calls material, and requires to be specially denied by the answer. The denial of an allegation of ownership is covered by the general issue. *McClintock v. Lacy*, 23 Ark. 215. As the general issue made by defendant's answer was not objected to by motion to make more specific, plaintiff should have proven under the code all that was necessary to sustain his case under the old practice.

2. There is no proof of negligence, nor of any act or omission which can be construed as such. The employees had a right to use the spur for the purpose they did to the end, and this use was reasonable under the circumstances, and "a party is not answerable in damages for the reasonable exercise of a right, unless upon proof of negligence, unskilfulness or malice." *R. Co. v. Yeager*, 75 Penn. St. 121.

The onus to prove negligence was on plaintiff. This is not a parallel case to *Milwaukee R. R. Co. v. Kellogg*, 44 U. S. 469. The burning of the spokes was not "a result reasonably to be expected" from switching the cars. See *Ryan v. Ry.*, 35 N. Y. 210; *Kerr v. Ry.*, 62 Penn. 353.

3. As to errors in instructions given and modified, see 27 Ga., 481; *St. L., I. M. and S. Ry. v. Freeman*, 26 Ark.; *Milwaukee Ry. v. Kellogg*, *supra*; *Thompson on Neg.*, Vol. 1, p. 153; *Toledo etc., Ry. v. Pindar*, 33 Ills. 457. Plaintiff's employees guilty of contributory negligence. *Wharton on Neg.*, secs. 361, 877; *Sher. and Red. on Neg.*, sec. 335; *Ill. Cent. Ry. v. McClelland*, 42 Ills. 355; *Ward v. R. R.*, 29 Wis. 144.

U. M. & G. B. Rose, for appellees:

1. There being some evidence, the verdict will not be disturbed. 31 Ark. 163; *Id.* 196.

2. The testimony shows the grossest negligence, perhaps, wilful destruction of property.

3. It was not the duty of defendant to save its own track regardless of injury to others. *Sic utere tuo ut alienum non laedas.*

4. Plaintiff not responsible for failure of his agents employed in other departments of his business to save the spokes. Their acts could only bind him within the scope of their agency.

Henderson & Caruth, also for appellees:

The question of negligence was properly submitted to the jury. *Milwaukee R. R. v. Kellogg*, 94 U. S. 469. "The care must be proportionate to the danger." *Thomp. on Neg.*, Vol. 1, p. 153.

The loss was the result of carelessness, and might have been foreseen. Toledo, etc., *R. R. v. Pindar*, 53 Ill. 457, and cases cited.

There was no contributory negligence. The instructions were too rigid against plaintiff. *Vaughan v. R. R. Co.*, 5 Hurl. & N. 679; 73 Penn. St. 121; 23 Ib. 373; 31 Iowa, 176; 7 Kan. 308; 15 Conn. 124; 41 Wis. 78.

ENGLISH, C. J.—I. The first ground of the motion for a new trial was, that the plaintiff failed to prove his ownership of the spokes.

The action was brought against the St. Louis, Iron Mountain and Southern Ry. Co. by Levi Hecht, surviving partner of the mercantile firm of Hecht & Brother, composed of plaintiff and Samuel Hecht, deceased.

The complaint alleged, in substance, that on the twenty-seventh of November, 1879, plaintiff was the owner of about 40,000 sawed spokes, of the value of \$480.00, which he had placed on a spur switch belonging to the defendant corporation, in the town of Corning, preparatory to having the same shipped to a market. That on said day two cars loaded with cotton, belonging to one of defendant's trains, caught fire, and defendant, by its servants and agents, caused said burning cars to be switched or placed on said spur switch, and by the negligence and unskilfulness of defendant, its agents and servants, said burning cars were allowed to run against said spokes, whereby they were destroyed.

The suit was for the value of the spokes.

The answer of defendant denied that 40,000 were destroyed at the time and in the manner stated by plaintiff. Denied that said sawed spokes alleged to have been destroyed were worth \$480.00, as stated in the complaint. Denied that the loss of the spokes was caused by defendant's negligence or unskilfulness of its servants or agents. Denied that said property was destroyed through any fault of defendant, but alleged that said property, if destroyed, was so destroyed by the negligence and carelessness of himself or his servants or agents.

The answer did not deny the allegations of the complaint that plaintiff was the owner of the spokes.

At common law, in actions for trespass for injuries to property, the plea of not guilty was a general traverse, and put in issue the allegations of title in the plaintiff. But in the Code pleading there is strictly, no general issue, and material allegations of the complaint, except as to value and amount of damage, not specifically controverted by the answer, are admitted. Gantt's Dig. sec. 4608.

The allegation in the complaint that the plaintiff was the owner of the spokes, was material, for without general or special property in them, he had no right of action for their destruction. The fail-

ure of the answer, therefore, to deny the allegation of property in the plaintiff, was an admission of its truth, and he was not required to prove it, as he would have been had it been denied.

There was some proof, however, that the spokes belonged to Hecht & Brother, and it was admitted on the trial that plaintiff was surviving partner of his deceased brother.

II. The second ground of the motion for a new trial was that "the court erred in giving instructions third and fourth asked by plaintiff, against the objection of the defendant."

The bill of exceptions states that "the plaintiff asked for the following instructions." Then they are copied; after which the bill of exceptions further states that "the defendant objected to the giving of the second, third and fourth instructions; the court sustained the objection as to the second, and partially as to the third and fourth, to which ruling of the court, as to the overruling of the defendant's objection to the third and fourth, and giving the same as amended, the defendant excepted."

This is all that the bill of exceptions shows about the instructions asked for plaintiff. What modification the court made in the third and fourth, or how they read as amended and given, does not appear. It is impossible for us to decide whether the court erred in giving the two instructions, as modified, without having them before us in the amended form in which they were given to the jury.

No objection was made by defendant to the first instruction asked for plaintiff, and given by the court. It was, that "If the jury find, from the evidence, that certain cars of defendant, loaded with cotton, caught fire, and that its agents, servants or employees, ran said cars into the spur switch, or side track, for the purpose of allowing the same to burn there, and negligently managed said cars, and that plaintiff's spokes were destroyed in consequence, they will find for plaintiff."

The court refused the second instruction moved for plaintiff, which was, in effect, that if the jury found that the property was destroyed by a fire set from defendant's burning cars, negligence on the part of defendant would be presumed, and it is for defendant to rebut such presumption by evidence of due care.

The third instruction, as it appears by the bill of exceptions, to have been moved for plaintiff was, that "The jury are instructed that the defendant would be liable if they find that defendant had no right to destroy the property of others merely to save its own."

Whether the defendant had the right to destroy the property of others merely to save its own, was a question of law for the court, and not for the jury. It appears from the bill of exceptions, as above shown, that the court modified this instruction, but in what form it was given is not stated. But it does appear, in an after-

part of the bill of exceptions, as will be particularly shown below, that the court charged the jury that it was the paramount duty of the employees of defendant in charge of the train to save the rest of the train and the main track from destruction and damage, if they could do so without damage to the property of others, etc.

The counsel for appellant admits that the objection to the fourth instruction moved for plaintiff, and given in some modified form not appearing, was removed by the eighth instruction given by the court of its own motion.

So we find nothing in the second ground of the motion for a new trial.

III. The third ground of the motion for a new trial was, that the court erred in modifying instructions second, third and sixth, and in refusing the fourth and seventh asked by defendant.

Before considering these instructions, and others given by the court of its own motion, the giving of which was made the fourth ground of the motion for a new trial, it is proper to state the substance of the evidence, introduced on the trial, to which the instructions related.

It appears from the evidence that the spur switch, mentioned in the complaint, started from the west side of the main railway track, north of the depot at Corning, and ran south, near to Harb's factory. The witnesses for the plaintiff stated that it was from one hundred and fifty to one hundred and seventy-five feet long. Pierce Galvin, witness for defendant, and section foreman at Corning, stated, on his examination in chief, that it was about one hundred and twenty feet long, but, on cross examination, he said it would hold about seven cars. The length of flat cars used for carrying cotton was proven to be twenty-eight feet. If the switch would hold seven of them it must have been one hundred and ninety-six feet long. It had a slight down-grade from the main track. It was used for loading spokes, staves and lumber, from Harb's factory, for putting off freight, and for taking cars from and putting them on the main track.

Hecht & Bro. directed to be piled, for the convenience of shipment, about 31,618 wheel spokes, sawed at Harb's factory; on the west side of the spur switch the pile commenced below the end of the switch and extended up to it towards the main track, about twenty-five feet, was, say five feet high and six feet distant from the west side of the switch. The pile was in four separate lots, stacked near each other and in the same line.

About three o'clock of the night of the twenty-seventh of November, 1879, a north-bound freight train of the defendant corporation had stopped at Corning, waiting for orders. It was on the main track, near a hotel. It seems the two rear flat cars were loaded with cotton. When the conductor discovered one of them to be on fire, he caused the train to be moved forward on the main

track to the spur switch, and the two cotton cars to be backed on to and down it until the hind trucks of the end car went over the terminus of the switch, where the two cars aflame were left and burned. The spokes caught fire from the blazing cotton cars, and were all burned, except about three or four thousand, which were saved by employees of the defendant and of Hecht & Bro. At the time the conductor discovered the cotton to be on fire he regarded the hotel and adjacent buildings, as well as the main track, to be in danger, and hence caused the burning cars to be put on the switch and detached from the train there. The wind was blowing, and there were indications of a storm. Had the burning cars been stopped by brakes, or "chunking," as some of the witnesses said might have been done, after they cleared the main track, both it and the pile of spokes would have been safe from the fire.

The jury found a verdict in favor of plaintiff for \$300. Other features of the evidence will be noticed below.

The defendant moved for seven instructions, the first of which the court gave, and which was as follows:

(1.) "If the jury find from the evidence that the employees of defendant, after discovering that the cotton was on fire, were not guilty of negligence in their effort to switch the burning cars into the spur of the railroad, but used ordinary caution in doing the same, under the circumstances at the time, to prevent any unnecessary damage, they will find for defendant."

The second instruction moved for defendant as follows:

(2.) "In order to hold defendant liable in this case, the jury are instructed that the burden of proof is on the plaintiff to show that the employees of defendant were guilty of negligence at the time of the occurrence, directly causing or contributing to the injury; and the negligence which will make the defendant liable is such negligent conduct on the part of the employees of the defendant at the time, knowing that the property of the plaintiff was in danger, as would amount to the performance or omission of some act which directly caused the damage alleged by plaintiff, and which a prudent business man, under all the circumstances at the time, would not have done, or omitted, and not the performance or omission of any act which subsequently, on reflection, might be supposed to have been possible in order to avoid the damages."

The court overruled part of this instruction, and gave it in a modified form as follows:

"In order to hold the defendant liable in this case, the jury are instructed that the burden of proof is on the plaintiff, to show that the employees of the defendant were guilty of negligence at the time of the occurrence, directly causing or contributing to the injury; and the negligence which will make the defendant liable, is the performance of, or the omission of some act (with a knowledge of danger to which property was liable on account of such act or omis-

sion), which no man of ordinary prudence would perform or omit under all the circumstances existing at the time."

The instruction as given, as far as it goes, is substantially the same as that asked for defendant. As given it embodies two propositions: First, that the burden of proving negligence was on the plaintiff; and second, that negligence is the performance of, or the omission of some act (with knowledge that another's property is liable to danger), which no man of ordinary prudence would perform or omit, under all the circumstances existing at the time.

This definition of negligence, as applicable to the case before the jury, was substantially correct and sufficient. *Bizzell v. Booker et al.* 16 Ark. 308.

Negligence has been variously defined.

Says Mr. Cooley (Cooley on Torts, p. 630): "All the circumstances are to be taken into account when the question involved is one of negligence; for negligence in a legal sense is no more nor less than this, the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

Negligence has been briefly defined to be the absence of care, according to the circumstances. *Philadelphia, Wilm. and Balt. R. R. Co. v. Stinger*, 78 Penn. Stat. 225.

The court omitted the last clause of the instruction as asked for defendant, which was, in effect, embraced in the definition of negligence, as given.

(3.) The third instruction, as moved for defendant, was as follows:

"The jury are instructed that it was the paramount duty of the employees of the defendant in charge of the train to save the rest of the train and main track from destruction and damage, and that they had a right to use the spur for that purpose—to switch off on it the burning cars; and that subject to this duty was that of avoiding unnecessary damage to the property of the plaintiff, knowing it to be on the side track or spur."

The court refused this instruction as asked, but gave it in the following modified form:

"The jury are instructed that it was the paramount duty of the employees of the defendant in charge of the train to save the rest of the train and the main track from destruction and damage, if they could do so without damage to the property of others being apparent and the probable result."

The instruction as given was more in harmony than as asked, with the maxim, *sic utere tuo ut alienum non laedas*—enjoy your own property in such a manner as not to injure that of another person.

Though a man do a lawful thing, yet if any damage thereby be

falls another, he shall be answerable, if he could have avoided it. Broom's Legal Maxims, pp. 275-6.

The rest of the train might have been saved by detaching the two burning cars and leaving them on the main track, after they had been moved forward far enough to place the hotel and other adjacent property out of danger. But the evidence conduces to prove that it would have been a greater loss to the company and inconvenience to the public for the two cars to burn on the main track and destroy part of it than to switch them off on to the spur and to allow them to burn there as was done. The spur belonged to the defendant, and its agents had the right to place the burning cars on it for the purpose of saving the main track, unless, as the court charged the jury, damage to the property of others was apparent, and the probable result. For though the spur belonged to defendant, it appears that it had been run out near to Harb's factory for the purpose of taking on and putting off freight there, and plaintiff's spokes, sawed at the factory, had been piled near the spur for convenience of loading onto the cars, and it is not shown or claimed that they were wrongfully placed there. Moreover, the evidence conduces to prove that the two burning cars might have been placed on the spur clear of the main track, and far enough from the spokes to save them from the fire. So, though the defendant's agents had the right to use the spur to save the main track, yet defendant was answerable for damage thereby caused to plaintiff's property, if by proper care, under all the circumstances, it could have been avoided.

(4.) In lien of the fourth instruction moved for defendant, the court gave the following:

"The fact that the cars ran off at the end of the track (spur) is not sufficient of itself to make defendant liable. But to render defendant liable, that circumstance must have been the result of carelessness or neglect of those having charge of the cars or train, and must have contributed to the burning of the spokes."

It is not submitted here that the court erred in giving this instruction instead of the fourth as asked.

It was in evidence that there were cross-ties piled at the end of the spur-switch for the cars to "bunk" against, and that these were forced away by the trucks of the car, which went over the end of the switch, and this brought the two burning cars a little further along the line of the pile of spokes than they would have been if they had been stopped at or before reaching the end.

(5.) The court gave the fifth instruction as moved by defendant, which was:

"The jury are instructed that the plaintiff, in placing his spokes along the track or spur of the railroad, assumed all the risk of damage to them occasioned by unavoidable accident or mischance, and that if the jury believe they took fire from the burning cars, acci-

dentially and unavoidably, and without negligence of defendant, they will find for the defendant."

(6.) The sixth instruction moved for defendant, was:

"The jury are instructed that it was the duty of the plaintiff, or of his agents or employees, when the danger was discovered by them, to which the spokes in controversy were exposed, to save them if possible; and if the jury believe that they could have saved them by the exercise of ordinary care and diligence, they will find for the defendant, even if they find the defendant guilty of negligence."

This instruction was given by the court in a modified form, as follows:

"The jury are instructed that it was the duty of the plaintiff, or his agents or employees, having the care or charge of said spokes, if present, when the danger was discovered by them, to which the spokes in controversy were exposed, to save them if possible; and if the jury believe that they could have saved them by the exercise of ordinary care and diligence, they will find for defendant, even if they find the defendant guilty of negligence."

It will be observed that the only modification made by the court of the instruction, as moved, was by the insertion of the words, "having the care or charge of said spokes, if present," between the word "employees" and the word "when."

This was a proper modification of the instruction, in view of the evidence before the jury. The two cars loaded with cotton, on fire, were switched on to the spur and left there, about three o'clock at night, when there were no persons present but such as were in charge of the train. It was not shown that the plaintiff, or any agent of his in care of the spokes was present when the burning cars were put on the spur and left alongside of the pile of spokes.

There was evidence that some of the employees of plaintiff were afterwards present.

The bill of exceptions states that the court orally explained the sixth instruction as given to mean, "that the employees of plaintiff, about any other business, were not obliged to do anything to save the spokes;" to which defendant excepted.

In *Illinois Central R. R. Co. v. McClelland*, 42 Ill. 356, McClelland sued the Illinois Central Railroad Company for the burning of a certain rail fence, and the grass and hay upon twenty acres of meadow adjacent to the railroad track.

There was evidence that in July, 1864, a passing engine of defendant set fire to the grass on the right of way near plaintiff's meadow fence. That at the time the son of the plaintiff, and in his employ, saw the fire while on his way to the house, and that forty or fifty minutes afterwards he returned and found the fire had got into the meadow.

The circuit judge refused to charge the jury, that "If the son and servant of the plaintiff saw the fire in time to put it out, while it was on the right of way, before it reached the plaintiff's meadow, it was his duty to do so. And if, through his negligence in not doing so, the fire consumed the property of the plaintiff, the defendant would not be liable therefor."

On error, the Supreme Court held that this instruction should have been given. Justice Bruse, who delivered the opinion of the court said: "It was a proper subject of inquiry by the jury: Could the plaintiff's son and servant, by the exercise of reasonable diligence, have prevented the spread of the fire? He saw the fire in time to arrest its progress, or at any rate in time to make some effort to that end, but did not choose to do so. He left the scene and was absent near an hour, and on his return the fire had reached the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part, for which the plaintiff is answerable, that he did not. The fire in the meadow in July may be charged to the negligence of the plaintiff's son, who was in a position to have prevented it." Cited in Wharton on Negligence, sec. 877.

It appears that one or two persons in the employment of Hecht & Bro., and others in the employment of defendant, saved such of the spokes as were not burned, by removing them from the pile after it took fire from the burning cars. It is probable that more of the spokes could have been saved if the employees in charge of the train had remained after the burning cars were switched on to the spur, and engaged in removing the spokes. It also appears that some persons in the employment of Hecht & Bro. came to the fire after the alarm was given, and while the spokes were burning, who might have saved some of them if they had engaged in removing them, but, like other bystanders who had collected there, they did nothing.

Hecht & Bro. had a store at Corning, and George Huntley was employed by them to attend to receiving and weighing cotton. He lived about four hundred yards from Harb's factory. Awaked by the alarm of fire, about three o'clock in the night, he supposed the factory was on fire; ran down to it, and found the two cotton cars all ablaze on the spur, and the engine and the rest of the train on the main track. The fire from the blazing cars was rolling up "awful high." He said to the men around there, "we ought to try to get the cotton away." When he got there, a man he took to be an employee of defendant was standing on the pile of spokes, and heard him say he "would not give a damn if they did burn," and he got down and went to the engine. Witness tried to get men to help save the spokes, but was told the railroad company would be responsible for burning them any way. The spokes business did not concern him at all. He was employed to receive

and weigh cotton. He thought he was not responsible for the spokes. He could have thrown away from the fire as many as he had a mind to. Did not know whether he could have saved any by hiring or getting men there to save them or not. He did not see any one else in the employment of Hecht there.

Another witness, A. J. Harb, got to the spur after the train had left, and when the spokes were on fire, and they continued to burn up to eight o'clock in the morning. He was of the firm of Harb Brothers, and went to work carrying away their stock, which was saved. Mr. Imboden, employed in Hecht's store at Corning, was at the fire when he got there. He also noticed there Morris Hecht, nephew of plaintiff, and in charge of the business at Corning. It was about four o'clock when witness got there. There were four lots in the pile of spokes, piled close together. The first lot had burned up, and the second was on fire when he got there. Imboden and Morris Hecht did nothing. A great many spokes might have been saved after witness got there. There were many men standing there, and witness never saw men less lively at a fire. They would not do anything at all.

It was no doubt the duty of Morris Hecht, who was perhaps in charge of the general business of Hecht & Bro., at Corning, to do anything in his power to save such of the spokes as might have been saved after he got to the fire, even if the negligence of the employees was the proximate cause of the pile of spokes being set afire. It may be said that the spokes were in his care or charge as the general business agent of plaintiff, and his deceased partner; and in the sixth instruction, as given, the court charged the jury that it was the duty of plaintiff, or his agents or employees having the care or charge of the spokes, if present, etc., to save them if possible, etc.

But was it the legal duty of George Huntley, employed to attend to receiving and weighing cotton, and of Imboden, employed in the store of Hecht & Bro., at Corning, to engage in the labor of removing and saving spokes when they got to the fire, and was the plaintiff chargeable with contributory negligence by reason of their failure to do so?

We think not. They were no doubt under a moral obligation to do anything in their power to save the spokes of their employers, and the bystanders were under a neighborly obligation to do so.

Huntley and Imboden did not sustain the same relation to plaintiff, as to the spokes, that the son and servant of the Illinois farmer did to his father and his fence and meadow, nor are the facts of this case and that alike.

The court did not err in orally explaining the sixth instruction, as stated in the bill of exceptions, and above shown.

The pile of spokes was probably on fire when Morris Hecht got there, and if on fire by the negligence of the employees of defend-

ant, his failure to labor to save as many of the spokes from burning as he could was not the proximate contributory cause of the fire, and did not excuse defendant from liability, but was matter in mitigation of damages to the extent of the value of such of the spokes as he might have saved by the care incumbent on him under the circumstances. How many spokes he might have thrown away from the encroaching fire after he got there, had he been active instead of idle, does not appear. Not as many, perhaps, as the employee of defendant whom Huntley found on the pile when he got there, and who it seems abandoned the spokes with an oath that "he did not care a damn if they did burn," and left.

(7.) The seventh instruction moved for defendant, was:

The jury are instructed that if the plaintiff placed his spokes too near the track of the defendant's railroad, and in this way exposed them unnecessarily to danger and loss, and left them without a watchman or proper agent to care for them, these circumstances will enable the jury to determine whether the plaintiff was guilty of contributory negligence, and if they find the plaintiff guilty of contributory negligence they will find for defendant, unless the jury find that the defendant, after discovering the danger to which they were exposed, could have avoided the injury by the exercise of ordinary care."

The court substituted for this instruction the following:

"In considering the question of contributory negligence on the part of the plaintiff, the jury will look to all the circumstances, the time of the day or night the fire occurred, and if the plaintiff had no watchman, or other person in care of his spokes; if not, whether a man of ordinary prudence would have had some one there in charge at that time, and under such circumstances, if so, were the spokes lost thereby; if plaintiff or his employees in charge of the spokes were present did they use proper diligence to save the spokes? These are all questions for the jury under all the circumstances in proof."

The question of contributory negligence on the part of the plaintiff, as well as the one of negligence on the part of defendant, was for the jury under all the facts and circumstances in evidence. The instruction as moved for defendant indicated but two hypothetical facts to be considered by the jury in determining the question of contributory negligence; while that given by the court submitted the question to them upon of all the facts and circumstances in proof, which was proper.

IV. The fourth ground of the motion for a new trial was that the court erred in giving instructions of its own against the objection of the defendant, instead of instructions four and seven asked for by defendant.

We have above considered the instructions given by the court instead or in modification of four and seven, asked for defendant,

(8.) Instruction number eight, which was given by the court of its own motion, and which was not objected to by defendant, was:

"If the jury find the defendant guilty of negligence, they will find for the plaintiff the value, on the ground at the time, of such part only of the spokes as were burnt and destroyed by the negligence of the defendant, and which the plaintiff could not have saved by the exercise of ordinary care."

Upon the whole, looking at all of the instructions, as given by the court, the questions of negligence, contributory negligence, and damages were fairly submitted to the jury without error prejudicial to defendant below, and appellant here.

V. The fifth ground of the motion for a new trial was that the verdict was contrary to law, and not supported by the evidence.

As above indicated, there was evidence conducing to prove that the employees of appellant might, by ordinary care, and the use of usual means, have switched the burning cars on to the spur and stopped them, after they had cleared the main track, far enough from the pile of spokes to save them from the fire, as well as the main track. Instead of doing this, it is probable that they were forced back, by the engine moving the train, to and over the end of the spur and left alongside of the upper end of the line of the pile of spokes, which caught fire from them.

The spokes, recently sawed at the factory, had been piled there for the convenience of loading, as was usual, to be sent to market on appellant's cars. The pile, in four contiguous lots, commenced below the end of the spur and extended up along it about twenty-five feet, and about six feet from it. The middle of the pile was about the end of the spur, and the spokes caught fire there.

We cannot say that there was not evidence to warrant the verdict.

VI. The sixth and last ground of the motion for a new trial, that the verdict was excessive, has not been noticed in the brief of appellant's counsel.

Looking at the evidence as to the number of spokes in the pile, the value of them on the ground at the time, the probable number burned, and the amount of damages assessed, the jury, perhaps, made some abatement for the value of such spokes as Morris Hecht might have thrown from the burning pile, had he engaged in that work.

We find in the evidence no clear ground on which we could award a new trial for excess in the verdict. In estimating damages the jury might have allowed interest on the value of the spokes from the time they were burned to the date of the verdict, which does not appear to have been done.

Affirmed.

See note, 7 Am. and Eng. R. R. Cas. 524.

ANDERSON FOWLER et al., Appellants,

v.

THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY,
Respondent.(87 *New York Reports*, 190. Dec. 13, 1881.)

Defendant contracted to transport on account of plaintiffs, "on board steamship Minnesota or Nevada, for Liverpool, three hundred bales of cotton." The cotton was then on its way from Mobile to New York, and the time of its arrival was uncertain. The Minnesota was advertised to sail October 27th, the Nevada a week later. The cotton was delivered at defendant's pier on October 26th; at that time defendant had a full cargo for the Minnesota, accepted and ready for loading: the cotton was therefore sent by the Nevada, and arrived at Liverpool a week after the Minnesota. Meanwhile the price of cotton had fallen. In an action to recover damages for alleged breach of the contract, *held*, the agreement was in substance, that if plaintiffs should deliver the cotton in reasonable time for loading it on board the Minnesota before its sailing day, it should be carried on it, otherwise upon the Nevada; but that the cotton was not delivered within such reasonable time; that defendant was not required to reject other freight to reserve room for the cotton, and so take the chance of being compelled to sail without a full cargo in case of its non-arrival, but had the right to accept what was offered to make sure of a full cargo, and was only required to carry the cotton on the first steamer if it was delivered on its pier before a sufficient cargo, accepted and ready for loading, was delivered; also, that defendant was not required to notify plaintiffs, on arrival of the cotton, that it could not go upon the Minnesota.

On arrival of the cotton upon the pier, defendant's agent gave receipts for it, each of which purported to be "memorandum of cargo on board steamship Minnesota." It appeared that these were intended simply as acknowledgments of delivery of the property, to be surrendered on delivery of the bills of lading, which constituted the contract of shipment. Bills of lading by the Minnesota were refused. *Held*, that the memorandum receipts did not vary the contract, or change the rights of the parties.

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made Dec. 14, 1880, which sustained defendant's exceptions, and granted a new trial. (Reported below, 23 Hun, 196.)

This action was brought to recover damages for an alleged breach of a shipping contract.

The broker's memorandum of the contract between the parties was as follows:

NEW YORK, October 14, 1869.

Engaged for account of Fowler Brothers, on board steamship Minnesota or Nevada for Liverpool, 300 bales of cotton at $\frac{1}{4}$ d. per lb.

Pier 46, North river.

CARY & GALE.

Agents:

WILLIAMS & GUION,
71 Wall Street."

At this time the *Minnesota* was advertised to sail for Liverpool from New York, on the 27th day of October, 1869, and the *Nevada* on the 3d day of November, 1869; the cotton was on its way from Mobile, with the day of its arrival uncertain. It reached New York on the 23d day of October, and sixty-two bales of it were sent to Pier 46, North river, on the 25th day of October, and the remainder on the 26th. When the cotton reached the pier the defendant had cotton there more than sufficient to fill the *Minnesota*, engaged specially for that vessel, and she sailed with a full cargo, without the cotton of the plaintiffs. She arrived out on the 7th day of November. The cotton of the plaintiffs went on the *Nevada* on the 3d day of November, and she reached Liverpool on the 14th. Between the 7th and the 14th there was a fall in the market value of cotton. When the cotton was received at defendant's pier, its receiving clerk gave memorandum receipts therefor, of one of which the following is a copy.

WILLIAMS & GUION, Agents,
No. 71 Wall street.
Notice.—Bills of lading
will not be delivered until
shippers furnish C. H. clear-
ance and gross weight or
gauge.

"NEW YORK, October 26, 1869.

Memorandum of cargo on board steamship *Minnesota*, bound of Liverpool. For account of Fowler Bros., marked F. Red, ten bales cotton.

R. A. WILLIAMS."

Williams was the receiving clerk of the defendant at the pier. On the day the steamer sailed, October 27th, the receipts were sent by plaintiffs to the office of Williams & Guion, with bills of lading for steamship *Minnesota*, to be signed on giving up the receipts; defendant's freight agent refused to sign the bills of lading, stating that the cotton was not on board. The plaintiffs then requested a return of the cotton that they might ship it by the *Inman* steamer, to which the agent replied that it was already on the *Nevada*, and he could not give him an order.

C. Van Santvoord, for appellants. The cotton having been delivered in time to go by the *Minnesota*, and having been receipted for, defendant could not claim the right to transfer it to the *Nevada*. (2 Bacon's Abr. 443, Election, B; Chitty on Contracts, 729; citing Co. Litt. 145 a; *Haweraft v. the Gt. Northern Ry. Co.*, 8 Eng. Law & Eq. 362; *Shelton v. Merchants' T. Co.*, 59 N. Y. 258, 263-4.) There is nothing in the circumstances of the case to discharge this obligation or to relieve the defendant from its liability, to respond in damages for its breach. (*Butler v. Maples*, 9 Wall. 766, 773, 774; *Cliquot Champagne Cases*, 3 Wall. 115; *Smith v. North Hampton Bk.*, 4 Cnsh. 1-11; *Bk. of Vergennes v. Warren*, 7 Hill, 91; *Tierney v. N. Y. C. & H. R. R. Co.*, 76 N.

Y. 306, 307, 308.) The right of action for injury for breach of contract in not taking the cotton on the Minnesota was not barred by plaintiff's taking a bill of lading for the Nevada, whereby to obtain the delivery of their cotton from that vessel. (*Bowman v. Teal*, 23 Wend. 306; *Howe v. Oswego & S. R. R.*, 56 Barb. 121; *Allaire v. Whitney*, 1 Hill, 486, 488; *McKnight v. Dunlap*, 1 Seld. 544.) The measure of damages is the difference between the market value when the goods should have arrived, and the value at the time of their delivery, the carrier being liable to the extent of the depreciation. (*Ward v. The N. Y. C. R. R. Co.*, 47 N. Y. 29, 32; *Collard v. South-eastern R. R. Co.*, 7 Hurlst. & Norm. 77.)

John Nash for respondent. The contract of the 14th of October gave defendant an election, whether to carry the cotton by the Minnesota or Nevada. *McNitt v. Clark*, 7 Johns. 465; *Smith v. Sanborn*, 11 id. 59; 2 Pars. on Cont. 651. The act of Williams in giving the receipt was not an exercise of the right of election by defendant. *Boice v. H. R. R. R. Co.*, 61 Barb. 611. The receipts given by Williams were not contracts; they were simply acknowledgments of the delivery of the cotton. *Shelton v. Merch. Trans. Co.*, 59 N. Y. 258, 263-4.

FINCH, J.—We are inclined to accept the plaintiff's construction of the transportation agreement which has occasioned the present dispute. It seems to us reasonable and just, and most in harmony with the apparent intention and understanding of the parties. Upon that construction the contract was substantially that if the plaintiffs should deliver the cotton to the steamship company at its pier, in reasonable time for taking it on board the Minnesota before that vessel's sailing day, it should be taken to Liverpool upon that steamer; otherwise, upon the Nevada, advertised to sail a week later. This construction leaves open only the question whether, upon the undisputed facts, the cotton was presented for transportation within such reasonable time as to make it the defendant's duty to ship it by the Minnesota, or whether they were justified in loading it for a later departure by the Nevada. The advertised sailing day of the earlier steamer was October 27th. The engagement to transport the cotton was dated October 14th. At that date the cotton was on its way from Mobile to Savannah, by rail, and from the latter port by the steamer *Mercedita*. The period of its arrival at the port of New York was uncertain. Neither shipper nor carrier could accurately foretell such period. That uncertainty was the determining element in shaping the form and substance of the contract. It dictated its alternative character, and inwove itself into the texture of the agreement between the parties. On the one hand, it prevented the plaintiffs from absolutely agreeing to ship the cotton by the Minnesota. They could not wisely have made that agreement, and did not. If they had so

contracted, the carriers could have relied upon it, and safely and prudently rejected other freight offered for shipment in order to reserve the necessary room. If for that reason compelled to sail without a full cargo, and so subjected to a loss of freight, their remedy would have remained against the shippers in default. But the same uncertainty which justifies the plaintiffs in not agreeing absolutely to furnish the cotton for the *Minnesota*, also justified its owners in not agreeing absolutely to carry it by that vessel. Clearly, they were under no obligation to reserve room for it at the peril of losing an equal quantity of freight. They were not bound to reject freight ready and offered on their pier upon the bare possibility that the cotton might come. They had the right to accept what was offered, as it came, and so make sure of a full and sufficient cargo. If the cotton came upon their pier while room was left—before a sufficient cargo, accepted and ready for loading, was proffered—they were bound to receive the cotton; but if, when it came, the cargo accepted was ready and complete, then they were not bound to carry it upon the *Minnesota*, but were at liberty to load it upon the *Nevada*. As matter of fact, the cotton arrived upon the pier only the day before the *Minnesota* sailed. When it arrived, the proof shows, without dispute, that the cargo of that steamer was complete; that, in the usual and regular course of business, enough of freight had been already delivered and accepted, and was in the custody of the carrier for shipment, to fill out the steamer's load, and leave no room for anything more. For that reason we think the cotton was not offered as freight within a reasonable time. It would be unreasonable to leave the shippers loose and hold the carriers fast. Their rights and duties should be measured by one and the same just standard. As the one was not bound to engage transportation upon an uncertainty, so the other was not bound to peril the loss of a full cargo upon the same uncertainty. What the latter could fairly do to save room for the cotton without danger of an incomplete load, it was their duty to do; but they were not obliged, on the day before the sailing of the vessel, to reject any part of the full cargo present and ready for shipment before the arrival of the cotton.

To this view of the rights of the parties, the learned counsel for the appellants makes a double answer. He says, first, that it was an indiscretion and fault of the defendants, that they engaged other cotton, by which the plaintiffs' cotton might be crowded out, without ascertaining whether the plaintiffs' cotton would be delivered for the *Minnesota*. But they had no means of ascertaining that fact in advance of its actual arrival. It was not expected that they should know until the bales came upon their pier. They were not bound to assume that it would come at all before the sailing day. Were they not at liberty, fairly, and in the usual and ordinary way, to accept the full cargo tendered on the dock, and

in the press, and was it a fault or indiscretion to do so? We think not. To hold otherwise would work the injustice of requiring them to refuse freight offered and ready to be loaded upon the uncertain expectation of freight not arrived, and which possibly might not come at all. The second answer made has even less of justice in it. We are told that when the cotton arrived, and it became apparent that it could not go upon the *Minnesota*, the defendant should have so informed the plaintiffs, in order that the latter might have protected themselves from loss from a declining market, by arranging for shipment on some other steamer. This view of the contract seems to go upon the idea, that while it bound the carrier, it left the shipper free. By its terms, if the cotton did not come in reasonable time for the first vessel, which, as we have seen, actually happened, then it was to go on the second. The carriers loaded it on the *Nevada*, as had been agreed. They fulfilled their contract; were they bound to suspect that the shippers wanted to break it, and take room on some other vessel? The duty which the carriers owed was the duty which they performed. It was not needed, so long as they performed their contract, that they should tell the other party that they were doing it, least of all for the purpose of enabling such other party to repudiate his side of the agreement.

We have not overlooked the fact, which is pressed upon our attention, as tending to characterize, and even to modify the terms of the contract, that upon the arrival of the cotton upon the pier, it was received by an agent of the steamship company, who gave receipts for it, each of which purported to be "memorandum of cargo on board steamship *Minnesota*." These receipts were shown to be merely acknowledgments that the property had passed into the custody of the carrier, and to be surrendered upon receipt of the bills of lading, which themselves constituted the contract of shipment. Bills of lading upon the *Minnesota* were refused; we do not think these memorandum receipts in any manner varied the contract, or changed the rights of the parties; the fact they asserted was simply a mistake. They did not purport to substitute a new contract in the room of the old one. *Shelton v. Merch. Dis. Trans. Co.* 59 N. Y. 263. We think the case was properly decided by the General Term.

Order of the General Term affirmed, and judgment absolute for the defendant upon the stipulation granted, with costs.

All concur.

Order affirmed and judgment accordingly.

THE ADAMS EXPRESS COMPANY

v.

S. G. McCONNELL.

(27 Kansas Reports 1882.)

Where a motion is made on the day preceding the day of trial to suppress a deposition, and on the next day, but prior to the commencement of the trial, the motion is presented to the court for hearing, and the court refuses to entertain the same on the ground that it is made too late, *held*, error.

Where M., on the 16th day of October, 1878, delivers a package of goods to an express company, to be transported by it from Lawrence to Dodge City, and on the arrival of the goods at Dodge City the consignee refuses to accept them, partly on the ground that they were not delivered (as it had been previously agreed they should be) on or prior to October 14, 1878, and principally on the ground that the goods were not such as he had ordered; and the evidence does not show that the express company was guilty of any fault or neglect; and the jury (in the action brought by the consignor against the express company for the value of the goods) finds in favor of the plaintiff, the consignor, and against the defendant, the express company; and the court refuses to set aside the verdict and grant a new trial: *Held*, Error.

ERROR from Ford District Court.

Action brought by McConnell against the Adams Express Company, to recover the value of a certain suit of clothes. Trial at the January Term, 1881, of the district court, and judgment for the plaintiff, and against the Express Company, which brings the case here. The opinion states the facts.

Blair & Perry, for plaintiff in error.

H. E. Gryden, for defendant in error.

VALENTINE, J.—This was an action brought by S. G. McConnell against the Adams Express Company, for the value of a suit of clothes. Judgment was rendered in the court below in favor of plaintiff and against the defendant; and the defendant, as plaintiff in error, brings the case to this court for review.

I. The first ruling of the court below complained of was a refusal to entertain a motion to suppress a deposition. On January 17, 1881, one day before the trial of the case, the defendant below, plaintiff in error, filed a motion to suppress a deposition which had previously been taken by the plaintiff. On the next day, but prior to the commencement of the trial, the motion was presented to the court for hearing, but the court refused to entertain the same, on the ground that it "was made too late." This was error, (Civil Code, §§ 364, 365;) but whether the error was material or not, may be questioned; and as we think it is not necessary to decide the question in the case, we shall pass to the consideration of the next question.

II. The plaintiff in error claims further, that the evidence in the case does not sustain the findings or judgment, and therefore claims that the court below erred in refusing to grant it a new trial. The facts of the case, as they appear from the pleadings and evidence, are substantially as follows: Some time in the month of September, 1878, one R. G. Cook ordered a suit of clothes to be made by the plaintiff, S. G. McConnell, who was a merchant tailor, at that time doing business in Lawrence, Kansas, and ordered them to be sent to Dodge City, Kansas. Cook selected the materials from which the clothes were to be made, and the price of the suit of clothes was to be \$35, and the clothes were to be delivered to Cook at Dodge City, on or before the 14th day of October, 1878. The clothes were finished by the plaintiff, as he claims, in accordance with the contract, and on October 16, 1878, he delivered them to the American Express Company at Lawrence, to be carried by it in the direction of Dodge City, to the point where its line connected with that of the Adams Express Company; and the American Express Company receipted to the plaintiff for the clothes. These goods were delivered to the American Express Company, to be carried by it and by the Adams Express Company in the manner which is usually known as "C.O.D.," the letters "C.O.D." meaning that the express company should collect on delivery the price of the goods, with the cost of their transportation, from the consignee. The American Express Company carried the clothes and delivered them to the Adams Express Company, in accordance with its contract, and the Adams Express Company carried them on to Dodge City, and soon afterward gave notice to Cook of their arrival at that place, and requested him to call and pay for the goods and take them away. There is nothing in the case that shows at what point the clothes were delivered to the Adams Express Company; nor is there anything in the case that shows when the goods were delivered to that company, or when they were received at Dodge City, or when the notice was given to Cook, except that all these things transpired within the month of October, 1878, and after the 16th day of that month. Cook examined the clothes, and refused to receive them, partly upon the ground that they did not arrive at Dodge City within the time that the plaintiff agreed he would deliver them there, but principally upon the ground, as Cook testifies, that the goods were not such as he ordered. He testified that the goods were to be of certain materials, and to be of the value of \$35, but that in fact the clothes delivered at Dodge City were not made from the materials which he selected, and were not worth more than \$25. The clothes remained in the possession of the Adams Express Company, and while so remaining in its possession, the plaintiff, McConnell, commenced this action against the company for the value of the clothes, which he alleged were worth \$35.

Upon these facts, we do not think that the plaintiff is entitled to recover. There is nothing to show that the defendant, the Adams Express Company, was guilty of any negligence or wrong. The plaintiff claims that the company failed to notify Cook of the arrival of the goods at Dodge City, but the evidence shows the contrary; and besides, there is not the slightest pretense, so far as the evidence shows, that Cook failed to receive the goods because of any want of notice to him. As before stated, he failed to receive them, or rather, refused to receive them, because they were not delivered at Dodge City within the time agreed upon, and because they were not the kind of goods which he had ordered; and there is nothing in the record that tends to show that the plaintiff ever demanded the clothes of the defendant, or ever ordered their return to him, or ever ordered their delivery to any other person than Cook, or ever even offered to pay for their transportation from Lawrence to Dodge City. So far as the evidence shows, the only fault or neglect on the part of any person was on the part of the plaintiff. But even if the express company had absolutely failed to give notice to Cook of the arrival of the goods at Dodge City, still Cook knew of their arrival, and refused to receive them—and hence the supposed failure of the Adams Express Company to give such notice did not cause any damage to the plaintiff; but, from the evidence, the express company was not guilty of any such failure.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

RIGGINS

v.

THE MISSOURI RIVER, FORT SCOTT AND GULF R. R. Co., Appellant.

(73 *Missouri Reports*, 598. 1881.)

A memorandum of agreement was written in the following form: "Lead from B. to St. L. at 22½ per 100. All lead shipped by C. & R. to be forwarded by M. R., F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time." *Held*, that the import of the memorandum was that the railroad company was to transport and C. & R. were to deliver to the company for transportation at 22½ cents per 100 pounds all lead shipped by C. & R. within the year 1873 to St. L.; that C. & R. did not bind themselves to ship any lead; but they did bind themselves to ship over the road of this company any lead they should ship to St. L., and that this was sufficient consideration for the company's guarantee of rates.

Where parties make and sign a memorandum of agreement with the un-

derstanding that a formal contract embracing the same stipulations is thereafter to be written out and executed, if they afterward act upon the memorandum it will be treated as a valid and binding contract, though never written out in a formal manner.

Plaintiffs agreed with defendant (a railroad company) for the transportation of all plaintiffs' lead for one year at a fixed rate of freight. During the year plaintiffs shipped some lead by another road, and the president of the railroad company hearing of it charged plaintiffs with having committed a breach of contract. Plaintiffs answered that there was no contract, to which defendant's president replied that defendant, on its part, would so understand the matter in the future. Shortly thereafter (on the 11th day of the month), defendant notified plaintiffs that from and after the 15th they would be required to pay a new and increased rate of freight. In the interval between the 11th and the 15th plaintiffs shipped several car-loads of lead over defendant's road at the old rate. This was also the rate at the time charged to all shippers. In an action upon the contract, defendant having pleaded the foregoing breach, and plaintiffs having replied waiver of the breach, the court instructed the jury, in substance, that if they believed the shipments made between the 11th and 15th were transported by defendant under the contract, and not in its capacity of common carrier, they would find that the breach had been waived. *Held*, correct.

If rescission be relied upon as a defence to a contract, it must be specially pleaded. Proof of the fact will not be admitted under a pleading which only denies the making of the contract and avers a breach of it.

APPEAL from Jackson Circuit Court.

Affirmed.

Pratt, Brumback & Ferry, for appellant.

The uncertainty and indefiniteness of the instrument on its face, leaving out, among other things, any mention of a corresponding obligation on the part of the respondents to ship all, or any, of their lead by appellant's road, show that it was intended, as respondents in their testimony state, as a memorandum of points to be included in a contract when Mr. Hayden should ascertain by what road he could best ship from Kansas City to St. Louis. *Chicago v. Sheldon*, 9 Wall. 50, 54; *Bishop on Contracts*, §§ 429, 598; *St. Louis Gaslight Co. v. City*, 46 Mo. 121, 128. The instrument sued upon is void for want of consideration. There is not a promise for a promise. It contains no mutual covenants, nor correlative obligations. It bound the respondents to nothing whatever. They were not obliged to ship all, or any, of their lead by appellant's road. *Parsons on Contracts* (5 Ed.), 448, 449; *Bishop on Contracts*, §§ 428, 429, 430; *Barton v. Great N. R. R. Co.*, 25 Eng. L. and Eq. 477; *Chicago, etc., Ry. Co. v. Dane*, 43 N. Y. 240. As to respondents' plea of waiver—there is no evidence to be submitted to a jury upon the question whether appellant, with full knowledge of the breach of the contract by respondents, afterwards accepted and carried lead over their road, under the contract. *Bishop on Contracts*, §§ 655 to 659. The testimony of Col. Coates was clear, positive and uncontradicted, and the court should have allowed it to be submitted to the jury upon the question of rescission by acts

of the parties. Bishop on Contracts, §§ 667, 668, 677, 686. It should also have been submitted to the jury upon the question of the right of one party to rescind a contract for breach by the other party. 2 Parsons on Contracts, pp. 675, 678; 6 Eng. L. and Eq. 230; Dubois v. Canal Co., 4 Wend. 285; 8 Reporter, 445.

O. H. Dean, for respondents.

Both parties having acted upon the memorandum of agreement as if it had been reduced to writing, as originally proposed, neither can object because it was not done. 51 Ill. 126; 27 Vt. 485. The memorandum shows a consideration on its face, plaintiffs agreeing to ship all their lead over defendant's road for one year, in consideration of defendant's agreeing to carry it for that time at a specified rate. Hadden v. Dimick, 31 How. Pr. 196; Smith v. Morrison, 21 La. Ann. 135; Grove v. Granger, 36 Wis. 369; Barton v. McLean, 5 Hill, 256; Attix v. Pelan, 5 Iowa, 339; Lewis v. Ins. Co., 61 Mo. 534. The breach of the contract made by plaintiffs was waived. Bersch v. Sander, 37 Mo. 104; McNaughten v. Cassally, 4 McLean, 530. The question whether the contract was rescinded or not could not be submitted to the jury, because not raised by the pleadings. Laraway v. Perkins, 10 N. Y. 371; Coles v. Soulsby, 21 Cal. 47.

HENRY, J.—This was a suit by plaintiffs against defendant for a breach of the following written contract:

“KANSAS CITY, MO., November 6th, 1872.

“Lead from Baxter to St. Louis, at 22½ per 100. All lead shipped by Chapman & Riggins to be forwarded by M. R., F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time.

“H. J. Hayden, G. F. A.

“Riggins & Chapman.”

The breach alleged was, that within the year 1873, plaintiffs offered large quantities of lead to defendant for transportation by the latter under said contract, which defendant refused to receive and carry under the contract, demanding of plaintiffs a greater price, and that the difference between said contract price and that they had to pay for transportation of said lead, was such that they were damaged in the sum of \$4500.

Defendant, by its answer, denied that the written instrument was, or was intended, or understood to be a contract, and alleged that it was only a memorandum of certain particulars which were to be a part of a contract thereafter to be reduced to writing and executed by both parties; and also denied that plaintiffs done or performed all, or any, of the provisions or agreements in said supposed contract by them to be done or performed; but that, in March, 1873, they shipped three car loads, or 60,000 pounds, of lead, from Baxter to St. Louis by the Atlantic &

Pacific Railroad and connecting lines at lower rates than those named in said supposed contract.

To this plaintiffs filed a replication, which was a general denial, and specially pleaded that from January 1st to April 15th, 1873, they shipped, and defendant transported for them, large quantities of lead from Baxter Springs to St. Louis under the terms and provisions of said contract; admitted the shipping by them of three car loads over the Atlantic & Pacific Railroad, but charged that after such shipment defendant, with knowledge of that fact, received and shipped over its road and under said contract, and prior and up to April, 1873, twelve car loads of lead, for which plaintiffs paid the rates specified in said written instrument.

There was evidence tending to prove that the written instrument sued on was not understood by plaintiffs, or defendant's agent who signed it, to be a contract, but only a memorandum by which one was subsequently to be prepared and executed by the parties, and also evidence to the effect that Col. Coates, president of the defendant company, and plaintiff Riggins, had an interview, in which Coates alluded to plaintiffs' shipment of lead by the Atlantic & Pacific Railroad, and complained of it as a breach of their contract with his company, and that Riggins said plaintiffs had no contract with the defendant, and that Coates then remarked: "Then, after this, we will understand it just as you do, and that there is no contract with us;" that after-knowledge of plaintiffs' shipment over the Atlantic & Pacific road was communicated to defendant, plaintiffs were informed by defendant on the 11th day of April, 1873, that, on and after the 15th of that month, increased rates would be charged, and that, after that notice was given, but before the 15th day of April, plaintiffs made shipments of lead over defendant's road under the contract and paid the price named in the instrument of writing sued on. It was also shown by defendant that the rates named in said writing were the same paid by all shippers of lead from Baxter to St. Louis over defendant's road.

The court, for plaintiffs, instructed the jury as follows:

1. The paper read in evidence, signed by Hayden, agent, and by Riggins and Chapman, is a valid contract on its face.

2. It is admitted that plaintiffs and defendant made and signed the memorandum of agreement read in evidence; and although the jury believe that at the time of making the same it was understood that the same should be written out in a more formal shape and thereafter signed by the parties; still if you believe from the evidence that after making the said memorandum, and for two or three months thereafter, plaintiffs delivered to defendants their lead, and defendant received and shipped, or caused the same to be transported from Baxter Springs to St. Louis, under the terms and provisions of said memorandum, then the same was a valid

and binding contract between the parties, though never written out in a more formal manner.

3. If the jury find that plaintiffs shipped, and defendant received and carried, or caused to be transported, for two or three months, plaintiffs' lead from Baxter Springs to St. Louis, under and pursuant to said contract, and although plaintiffs did, in the month of March, 1873, ship some three or more car loads of their lead over the Atlantic & Pacific Railroad from Minersville; still if you find that after the defendant, its officers or agents, acting within the line of their duties, had notice of such shipments, it, the defendant, received plaintiffs' lead and shipped the same to St. Louis, and so continued to do up to the 15th day of April, 1873, at the rates and under the terms of said contract; and that, after the 15th day of April, 1873, defendant refused to take or transport plaintiffs' lead at a less rate than \$71 per car, or 37½ cents per 100 pounds; that plaintiffs then offered to ship their lead over defendant's road at the contract price, and that defendant refused to take or transport the same at such price, then your finding should be for plaintiffs.

4. The jury are instructed that although plaintiffs did in the month of March, ship three or more car loads of their lead over the Atlantic & Pacific Railroad; still if after that plaintiffs went back and shipped over defendant's road; and if after the officers or agents of defendant had knowledge that plaintiffs had shipped said lead over the said Atlantic & Pacific Railroad, it, the defendant, received and shipped plaintiffs' lead for a time under and in pursuance of the contract; then such facts constitute a waiver by defendant of its right to annul said contract on account of plaintiffs having shipped such lead over the Atlantic & Pacific Railroad.

5. If defendant, with knowledge that plaintiffs had shipped three car loads of lead over the Atlantic & Pacific Railroad, thereafter received and shipped several car loads of plaintiffs' lead at and under the terms of the contract, and if the raise in the freight on lead was made thereafter by defendant pursuant to an arrangement by it made with the Atlantic & Pacific Railroad, or between those roads and connecting lines, and not by reason of plaintiffs having shipped over the Atlantic & Pacific, then such facts constitute a waiver by defendant of its right to annul said contract on account of plaintiffs having so shipped over the Atlantic and Pacific Railroad.

6. If the jury find for plaintiffs, you will assess their damages at the difference between what it would have cost them under the contract to have shipped their lead during the remainder of the year, after the raise in freight thereon by defendant, and what it did cost the plaintiffs to ship their lead during the remainder of such year, less the amount of freight as per terms of contract, on the cars of lead shipped over the Atlantic & Pacific Railroad be-

fore the 15th day of April, 1873, with interest on such difference at the rate of six per cent per annum from commencement of this suit.

Appellant asked the court to give four instructions, as follows, to wit:

1. If, from the evidence, the jury find that plaintiffs understood and believed that the writing dated November 6th, 1872, read in evidence, was not a contract binding on them, but merely a note or memorandum of points or particulars to go into a contract they expected thereafter to make with defendant, and that plaintiffs, in March, 1873, shipped three cars of lead over the Atlantic & Pacific Railroad and connecting lines of St. Louis, and that after such shipment and before the raise of freights on lead in April, 1873, the president of defendant and the plaintiff Riggins, came to an agreement and understanding that there was no contract or agreement between the plaintiffs and defendant as to the transportation of lead, then the jury must find for defendant.

2. If from the evidence, the jury find that the writing of November 6th, 1872, read in evidence, was understood and believed by plaintiffs not to bind them to ship all their lead over the road of defendant from January 1st, 1873, to January 1st, 1874, but to be merely a note or memorandum of points or particulars to go into a contract the plaintiffs expected to make with defendant some time after signing said writing dated November 6th, 1872, and that plaintiffs acted on such belief and understanding, then the jury must find for defendant.

3. If, between January 1st, 1873, and the agreement, if any, of the railroad companies raising the freight on lead, the plaintiffs, through Mr. Riggins, and the defendant, through its president, came to an understanding, or agreement, that there was no contract between the plaintiffs and defendant as to the shipping of lead, or that any contract there was between them as to the shipping of lead was at an end, then the jury must find for defendant.

4. If the jury find from the evidence that after January 1st, 1873, and before April 15th, 1873, and before the raise in freights by defendant, Col. Coates, the president of defendant, and the plaintiff Riggins, had a conversation in which Riggins stated, in effect, that plaintiffs had no contract with the defendant for the transportation of lead, and that Col. Coates thereupon stated, in effect, to Riggins, that they would then consider that there was no contract, and that Riggins said, "very well," or words to that effect, then your verdict must be for the defendant.

The court gave instruction No. two, but refused to give instructions Nos. one, three and four, and for the refusal to give them appellant at the time excepted. There was a verdict and judgment for plaintiffs, from which defendant has appealed.

We see no objection to the first instruction for plaintiffs. While

the instrument sued on by no means fully expresses the terms of the agreement, it is not difficult to ascertain from the language employed the substance of the stipulations. Defendant was to transport and plaintiffs were to deliver to defendant to be transported for them, at 22½ cents per 100 pounds, all lead shipped by plaintiffs within the year 1873, from Baxter to St. Louis, and although plaintiffs did not bind themselves to ship any lead, they did obligate themselves to ship over defendant's road all they should ship from Baxter to St. Louis; and the position that there was no consideration for defendant's promise, is untenable. Plaintiff's agreement to ship over no other road, and to give to defendant's road all their freight, was a sufficient consideration for defendant's promise. The instrument in question is unlike the proposition by the defendant to the plaintiffs in the *Chicago and E. Ry. Co. v. Dane*, 43 N. Y. (1 Hand) 240, and the acceptance there made. As was said by the court: "The latter amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendant as it chose; and had there been a consideration given to the defendant for such option, the defendant would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any." We think that case no authority for the position of appellant's counsel here.

The second instruction for plaintiffs assert a doctrine well sustained by authorities. *Paige v. Fullerton Woollen Co.*, 27 Vt. 485; *Miller v. McManis*, 57 Ill. 126.

The third instruction, with respect to the violation of the agreement by plaintiffs in shipping lead over the Atlantic and Pacific road, and the waiver by defendant of said breach of the contract, fairly submitted that question to the jury in both of its aspects. It required the jury to find, not only that after said violation of the contract by plaintiffs, they shipped lead over the defendant's road from Baxter to St. Louis, but that such shipping was done after defendant was aware of the alleged breach of the contract by plaintiffs, and at the rate and under the terms of said contract. And although the rate given plaintiffs, by the contract, was the same as that given to shippers generally, and, as a common carrier, defendant could not have refused to receive freight offered by plaintiffs to be carried at that rate, yet, if under and in pursuance of the contract, and not under this general liability as a common carrier, the defendant received the lead at Baxter to be transported to St. Louis, after the breach on plaintiff's part, and with knowledge of such breach, it was a waiver by defendant of said breach of contract by the plaintiffs. For the same reason the fourth and fifth instructions for plaintiffs are correct.

The first instruction asked by defendant was properly refused,

because, if the instrument of writing sued on was not a complete contract when it was signed, and the contract contemplated by the parties was never concluded, then, without regard to the understanding subsequently had between Coates and Riggins, the defendant was not bound. If, on the other hand, the written instrument was, when signed, a complete contract, or became so by the subsequent conduct of the parties, as submitted in the second instruction for plaintiffs, then the understanding between Coates and Riggins could only have operated as a rescission of the contract, and no such defence was relied upon in the answer. The same observations apply to the third and fourth of defendant's refused instructions. The defendant did not plead a rescission of the contract, but denied its existence, and also alleged that plaintiffs had violated it. Under such pleading defendant could not avail itself of a rescission of the contract.

Intricate questions of fact were involved in the case, but they seem to have been fairly submitted to the jury by the instructions of the court, and the judgment is affirmed. All concur.

BUTLER

v.

EAST TENNESSEE AND VIRGINIA R. R. Co.

(8 *Lea, Tenn., Reports*, 32. 1881.)

The duty of a railroad company is to carry freight to the place directed, and to deliver it to the party entitled if there ready to receive it, and if not, to store it for him. The liability of the company as a common carrier ceases when the freight is deposited in a warehouse, and is not extended by the act of 1870, ch. 17 (Code, sec. 1993j), requiring the company to give a prescribed notice to the consignee.

APPEAL in error from the Circuit Court of Monroe County.

McCroskey & Hicks, for Butler.

George Brown, for Railroad Company.

COOPER, J.—Action brought by Butler against the railroad company for the value of a trunk and its contents. The case was tried by the judge, without a jury, who rendered judgment in favor of the company, and the plaintiff appealed.

On January 1, 1878, the plaintiff at Mossy Creek, directed the defendant to ship the trunk on its train to Philadelphia, Tennessee. The plaintiff, after he had ordered the shipment, walked from Mossy Creek to Philadelphia, or its vicinity, about seventy miles, and arrived on the 9th of January. The trunk was destroyed by fire in the burn-

ing of the depot of the company at Philadelphia on the night of the 12th of January, having reached that point about ten days before and been stored in the depot. The plaintiff says he went to Philadelphia on January 13th, "to see if my trunk was burned." He adds that he has no family, is a millwright, travels about to get work, and has no fixed home. The agent of the company did not notify the plaintiff of the arrival of the trunk, because he did not know his post-office or where he lived. The fire occurred without any fault of the company.

The duty of the railroad company was to carry the plaintiff's trunk to the place directed, and to deliver it to the plaintiff if he was ready to receive it, and if not, to store it for him in their station warehouse: *Dean v. Vaccaro*, 2 Head, 490. The liability of the company as a common carrier ceased when the trunk was deposited in the warehouse. The subsequent loss by fire without any fault on the part of the company would fall upon the owner of the goods. *Express Company v. Kaufman*, 12 Heis. 161; *Rankin v. Memphis Packet Co.*, 9 Heis. 564, 570.

It is suggested, rather than argued, that the common law liability of the railroad company, as a common carrier, has been extended by the act of 1870, ch. 17 (Rev. Stat., sec. 1993j). The first section of that act makes it the duty of all common carriers and express companies doing business in this State, after the receipt of freight for delivery at their warehouse, depot or station, to notify the consignee, by written or printed notice, to be delivered to the consignee in person, at his place of business, if in the city or town where received; or if not residing or doing business in the city or town, then through the post-office, within three days after the arrival of goods. It was the duty of the carrier to notify the consignee of the arrival of freight before the statute, though not necessarily in the mode prescribed. *Dean v. Vaccaro*, 2 Head, 490. The designation of a particular form and manner of notice would not, by any fair intendment, change the character of the carrier's liability. And the severity of the common law rule forbids its extension by the courts in the absence of positive legislation. And the company was certainly in no fault for failing to give the plaintiff notice in this case. He had no fixed residence, nor the company any knowledge of his temporary stopping place.

Affirm the judgment.

See note, 7 Am. & Eng. R. R. Cas. 404.

WALKER

v.

DETROIT, G. H. & M. R. Co.

(Advance Case, Michigan. October 31, 1882.)

A garnishee cannot be held in justice's court except upon such liability as is admitted by the disclosure, which must not be ambiguous.

A railway company, being garnished, disclosed by its agent that as common carrier it had in its possession goods consigned to the principal defendant, but the agent did not know whether they belonged to such defendant and had no personal knowledge of his business or of other consignments. *Held*, insufficient to make the company liable as garnishee in a proceeding before a justice.

Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee.

The garnishment statute does not attempt to cut off the rights of strangers to the litigation or to compel a garnishee at his peril to decide questions of fact as to ownership on which he has no means of knowledge.

ERROR to Wayne.

John W. McGrath, for plaintiff and appellant.

Griffin, Dickinson, Thurber & Hosmer, for defendant.

CAMPBELL, J.—The only question in this case is whether any recovery could be had against the defendant corporation as a garnishee, under the disclosure filed, or by resort to further evidence. It has been uniformly held that no recovery can be had against a garnishee in a justice's court, except upon such liability as is admitted by the disclosure. There must be no ambiguity. *Spears v. Chapman*, 43 Mich. 541; [S. C. 5 N. W. Rep. 1038;] *Weirick v. Scribner*, 44 Mich. 73; [S. C. 6 N. W. Rep. 91;] *Sexton v. Amos*, 39 Mich. 695; *Hackley v. Kanitz*, 39 Mich. 398; *Lorman v. Phoenix Ins. Co.*, 33 Mich. 652. The disclosure in its original, supplemented by its amplified form, shows that defendant as a common carrier had in possession certain oats consigned to the principal defendant, *Thomas Hill*; but the agent making disclosure did not know whether they belonged to *Hill*, and had no personal knowledge of *Hill's* business and none of other consignments. He knew *Hill* had done business with the company, but not its nature or extent. We think this is not sufficient. While in the absence of any other directions goods are generally deliverable to the consignee, yet it is a frequent occurrence that bills of lading and consignment are transferred to third persons in the ordinary course of business, and the carrier must recognize such transfers. It is also

a matter of every-day practice to make consignments to factors and agents. Unless protected by proper vouchers a carrier cannot assume to deal with consignments as in all cases actually and beneficially belonging to the consignee, and the statute does not attempt, if it could do so, to cut off the rights of strangers to the litigation, or to compel a garnishee at his peril to decide questions of fact on which he has no means of knowledge. The process of garnishment, if such use were made of it, would be very oppressive. We think the judgment below was correct, and it must be affirmed with costs.

The other justices concurred.

EVANSVILLE & TERRE HAUTE R. R. Co.

v.

ERWIN.

(*Advance Case, Indiana. Nov. 27, 1882.*)

A contracted with B to sell and deliver to him at a certain railroad station a car load of wheat at a certain sum per bushel, payment to be made therefor on delivery of the wheat, B representing that he had no cash for that purpose. The wheat was delivered, weighed, and put by A in a car on the siding at the station. A then asked B for the money. B replied that he had not the money, but he would have it with him next day. A replied that B could not have the wheat until it was paid for. B assented and agreed to allow the wheat to remain where it was. Before payment B obtained from the agent of the railroad a bill of lading for the wheat, which he sold for value to a *bona fide* purchaser without notice. The company subsequently threatened to deliver the wheat to the holder of the bill of lading, whereupon A brought replevin.

Held, that by the terms of the contract between A and B payment of the price was a condition precedent to the passage of the title and that therefore the ownership of the wheat continued to be vested in A.

Held, further, that the issue of the bill of lading and the attempted sale of the wheat and assignment of the bill did not preclude plaintiff from recovering his property.

Howk, J.—In this case, the appellee, the plaintiff below, alleged in substance in his complaint that he was the owner and entitled to the possession of four hundred bushels of wheat then in "White-line car, E. & T. H., No. 1887," standing on the side track at Miller's Station, in Gibson County, Indiana, of the value of three hundred and seventy-five dollars; which the appellant, the Evansville and Terre Haute R. R. Co., had possession of, without right, and unlawfully detained from the appellee; wherefore, &c.,

On the application of the appellant, George H. Stuart, he was made a defendant in this action. The cause was put at issue and submitted to the court for trial; and at the appellant's request the

court made a special finding of the facts, and stated its conclusions of law thereon in favor of the appellee. The appellants severally excepted to the court's conclusions of the law, and judgment was rendered thereon in appellee's favor and against the appellants; to which judgment they severally and separately excepted, and have appealed therefrom to this court.

Errors have been assigned here by the appellant, which call in question the court's conclusions of law upon the facts specially found. The special finding of facts and the court's conclusions of law thereon were in substance as follows:

Be it remembered, that on the trial of the above cause before the court, the defendants requested the court to find the facts specially, and state the conclusions of law arising thereon, with a view of excepting to the decision of the court upon the questions of law involved in the trial.

1. The court finds the facts to be as follows, to wit: On the 24th or 25th of March, 1879, the plaintiff then being the owner of the wheat in controversy, made an agreement with one Hart to sell and deliver to him, at Miller's Station, a point on the line of the Evansville & Terre Haute Railroad, one car load of wheat at and for the price of ninety-three cents (93 cts.) per bushel. The agreement between the plaintiff and the said Hart being that the wheat should be delivered, weighed and paid for at Miller's Station, and that the payment should be made upon delivery of the wheat, the plaintiff at the time the agreement was made stating that Hart was a stranger to him, and that he must pay upon delivery, which Hart assented to, and represented that he had the money to pay for the wheat then.

Hart then procured the defendant, the Railroad Company, to leave an empty car, suitable for the shipment of wheat, on the switch at Miller's Station.

2. Subsequently, on the 27th of the same month, the plaintiff hauled and delivered three hundred and eighty-four bushels of wheat, it being the wheat he had agreed with Hart to deliver, and being the same now in controversy; the wheat was weighed at Miller's Station, and put by plaintiff in the car furnished by Hart on the side track of the defendant's road. When the plaintiff had finished delivering the wheat, Hart nailed up the car ready for shipment. The plaintiff calculated the amount due, and asked Hart for his money. Hart replied that he did not have any money with him, but that it would be up next day. Plaintiff then told Hart he could not have the wheat until it was paid for. Hart assented to this, and said that he was in no hurry for the wheat, that he would let it remain there until he obtained the money, that he would have the money next day at Patoka, and if plaintiff would come to Patoka he would pay him there, or bring the money to him, as he preferred, to which plaintiff assented, but no definite

agreement was arrived at between the parties whether they should meet at Patoka, or whether Hart would bring the money to plaintiff.

And thereupon Hart went away on foot towards Patoka, and plaintiff went to his home, one mile from the point where the wheat was delivered. The parties separated about sundown on the evening of the 27th. Miller's Station is situate in Gibson County, Indiana, about two and a half miles north of Patoka, on the defendant's road. Defendant, the Railroad Company, has no agent at that point, and no agent of the company was present at the time of the weighing and delivery of the wheat.

3. About 9 o'clock on the night of the 27th, Hart applied to the agent of the defendant, the Railroad Company, at Pakota, at his residence, for a bill of lading, informing him that he had the car loaded, and that he desired its early shipment. The agent refused to issue the bill of lading that night. Again, on March 28, at the hour of 7:20 A.M., Hart applied to the same agent at the office of the Railroad Company, in Pakota, for a bill of lading, representing to the agent that he had the car loaded with wheat, and thereupon the agent gave him a bill of lading, of which the following is a true copy:

COPY.

[FORM 18.]

"Where rates per car load are quoted, it is meant to include twenty thousand (20,000) pounds, unless otherwise specified. Twenty-four thousand (24,000) pounds is the maximum weight per car that this company has fixed as the weight to be loaded thereon, and any excess over that weight on any car may be unloaded at shipper's expense, or double rates of freight charged on the excess above said weight, at the option of this Company."

**EVANSVILLE & TERRE HAUTE
RAILROAD,
Patoka Station, March 28, 1879.**

Received from W. B. Hart the following packages (contents and value unknown), in apparent good order, to be transported over the line of this road to the company's freight station at Evansville, and there to be delivered to L. Ruffner, Jr., or order on payment of freight, and charges in par funds, upon the following conditions:

That the company will not be held responsible for leakage of liquids, breakage of glass or queensware, the injury or breakage of looking glasses, glass show cases, picture frames, stove castings and hollow ware, or for any injury to hidden contents of packages, nor for the loss of weight of grain or coffee in bags, or rice in tierces; nor damage ensuing to any article carried from the effect of heat or cold; for the loss of nuts in bags, or lemons or oranges in boxes, unless covered with canvas; or loss or damage to goods occasioned by Providential causes, or by fire from any cause whatever, while in transit or at station.

It is agreed, That all the articles at the several way stations and platforms, where the company has no agent, will be at the risk of the owner, shipper or consignee, from the moment such articles are unloaded, as directed, or marked.

It is further agreed, That the company will exercise the right of placing in store, at the expense and risk of the owner, all articles of freight not removed within twenty-four hours after arrival at depots.

It is further agreed and understood, That grain in bulk will be at the owner's risk of short weight, except when caused by negligence of the company, and that property, under this bill of lading, will be subject, at its owner's cost, to necessary coopering or baling.

It is expressly agreed and understood, That the shipper or agent of the property herein named, by accepting this bill of lading, agrees to all its stipulations, exceptions and conditions.

MARKS.	ARTICLES.	WEIGHT SUBJECT TO CORRECTION.	CHARGES.
W. L. 1887.....	One Car Bulk wheat....	23,100	
Copy of receipt received of G. H. Start & Co., for 1 car of wheat, No. 1887, 325 bush. at 98½.....	Signed, F. C. COWDEN, Ag't.		
Signed, W. B. HART.			\$359 97

Endorsed on back, L. RUFFNER, JR.

Which he carried away with him, and went south to Evansville on the train that passed Pakota at 7:41 A.M.

4. Hart reached Evansville, Ind., about 9 o'clock on the morning of the 28th of March, 1879, and went directly to the office of the defendant, George H. Start, and presented the bill of lading to him, who, having been informed by Ruffner, the consignee, that he was negotiating for the wheat, took the bill of lading, and paid Hart the full value of the wheat at that point, 93½ cents per bushel, and Ruffner assigned the bill of lading to Start. The wheat was purchased by Start from Hart, and the money paid Start at 9½ o'clock A.M. of said day.

At the time of purchase the defendant Start had no notice of any claim to the wheat by the plaintiff or any other person, and bought the same in good faith.

5. On the morning of the 28th of March, the plaintiff went to the town of Patoka and inquired after Hart, and waited there until the arrival of the 11:30 A.M. train from Evansville. Hart not coming on that train, he then notified the railroad agent not to let the wheat be moved until he got his money, and was informed by the agent that he had already issued a bill of lading, and that Hart had taken it away with him on the first train south, and that he

could not hold the wheat. The plaintiff then came to Princeton to inquire as to his legal rights, and sent an attorney to Evansville on the 2 P.M. train to look for Hart.

6. The defendant, the Railroad Company, on the 29th of March, 1879, brought the car containing the wheat that had been placed in it, as before found, from Miller's Station to Princeton, Ind., and was proceeding to deliver said wheat at Evansville, Ind., when plaintiff commenced this action, and seized and took it into his possession by virtue of a writ of replevin issued herein.

7. Wheat of the quality of that in controversy was worth, at the time the same was placed in the car, and at the time of the agreement with Hart at Miller's Station, 91 cents per bushel, and at Evansville it was worth 93½ cents per bushel, and, within a few days after this action was commenced, was worth in Evansville 96 cents per bushel, and has been worth as much as \$1.05 per bushel in that market between the date of the taking this wheat by plaintiff and the trial of this cause.

8. Hart left the State without paying plaintiff any portion of the contract price of said wheat. The agent of the Railroad Company was notified of plaintiff's claim and his desire that the wheat should not be removed until payment was made to him before the car was moved.

9. Upon the foregoing facts, the court finds, as a conclusion of law, that the title to the wheat in controversy did not pass from the plaintiff to Hart; that the plaintiff did no act or acts that amounted to a waiver of the condition precedent, that Hart should pay him in cash for the wheat before the title passed out of plaintiff.

That the subsequent issuing of a bill of lading, and the attempted sale of the wheat, and assignment of the bill to defendant Start, does not, in law, preclude the plaintiff from regaining his property.

That the plaintiff is entitled to a finding in his favor that he is the owner of the wheat in complaint mentioned, and for one cent damages."

O. M. WELBORN, Judge.

The appellant's learned counsel say, in argument: "A single point is presented by the assignment of errors in this case, and that arises, we submit, from an unwarranted assumption by the court that the wheat was sold upon a condition precedent that the title should not pass until the purchase-money was paid, and that appellee had done nothing to waive his right to hold the same. We concede that, if property is sold upon condition that no property shall pass till the purchase-money is paid, then, the sale being conditional, no property can pass without the performance of the condition."

It will be observed, that counsel claim the decision below to be erroneous, because of the court's "unwarranted assumption" of

these two conclusions of law: 1. That the wheat was sold upon a condition precedent, that the title should not pass until the purchase-money was paid. And 2, That the appellee had done nothing to waive his right to hold the wheat. These were the legal conclusions of the court, from its special finding of facts. The court found the facts in regard to appellee's sale of the wheat to be as follows: Appellee agreed with one Hart to sell and deliver to him, at Miller's Station, on the E. & T. H. Railroad, one car load of wheat, at 93 cents per bushel, payment therefor to be made upon delivery of the wheat, Hart assenting to appellee's statement that he must pay upon delivery and representing that he had the money then to pay for the wheat. Upon these facts, we think the court was authorized to state as a conclusion of law, that appellee's sale of the wheat to Hart was made upon the condition precedent that Hart should pay him the contract price for the wheat upon its delivery. "It is a general rule in all executory agreements for the sale of chattels, that the seller's obligation to deliver, and the buyer's obligation to pay or render equivalent, are concurrent conditions in the nature of conditions precedent." Where the circumstances of the transaction are such as to indicate, that the seller agrees to transfer his property, in consideration of the buyer's actual payment of the agreed price on delivery, "each party is bound to the other by concurrent condition, the seller to deliver, the buyer to pay." 2 Schoul. Pers. Prop. p. 291.

Where the payment is to be made simultaneously with delivery, and is omitted, evaded or refused by the vendee, on getting the goods under his control, the delivery in such case is merely conditional, and the non-payment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have the right instantly to reclaim the goods. 2 Kent Comm. 497.

In *Coggill v. Hartford, etc., R. R. Co.* 3 Gray, 545, it was held by the Supreme Court of Massachusetts that a sale and delivery of goods, on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed; and the vendor, if guilty of no laches, may reclaim the property even from one who has purchased from his vendee, in good faith and without notice. The court said: "The vendee, in such cases, acquires no property in the goods. He is only a bailee for a specific purpose. The delivery, which in ordinary cases passes no title to the vendee, must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary

result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

So, in *Adams v. O'Connor*, 100 Mass. 515, it was held by the same court, that, on a sale of goods for cash, no title vests in the purchaser till the price is paid. The court said: "The sale to the defendants, having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchaser until the terms of sale had been complied with." *Tyler v. Freeman*, 3 Cush. 361, *Whitney v. Eaton*, 15 Gray, 225, *Hirschorn v. Canney*, 98 Mass. 149.

The facts found by the court, in the case at bar, show very clearly as it seems to us, that the appellee sold his wheat to Hart for cash on delivery, and that, as Hart had never complied with the terms of sale, the title to the wheat never passed to him from the appellee.

The court found, that the wheat was delivered and weighed, at Miller's Station, and put by appellee in a car, furnished by Hart on the side track of appellant's road; that Hart then nailed up the car, ready for shipment; that appellee then asked Hart for his money, and Hart replied that he did not have the money with him, but it would be up next day; that appellee then told Hart he could not have the wheat until it was paid for; and that Hart assented to this, and said that he was in no hurry for the wheat and would let it remain there until he obtained the money. We are of the opinion, that, upon the facts found, the court's conclusion of law was right that there was no waiver by appellee of the condition that he should be paid in cash the agreed price for his wheat, before the title thereto should pass to Hart. The court also stated as a conclusion of law, upon the facts found, that the issue of a bill of lading, and the attempted sale of the wheat and assignment of the bill of the appellant, Start, did not in law preclude the appellee from regaining his property. This conclusion, we think, is clearly right.

In *Saltus v. Everett*, 20 Wend. 267, Chancellor Walworth said: "The bill of lading is, by the custom merchants, transferable so as to vest in the assignee the title to the goods, which the assignor had in them; but if a person, without authority from me, ship my goods and takes a bill of lading in his own name, he cannot by assigning that bill of lading to another, divest my title to the property." In the same case it was also said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That 'no one can transfer to another a better title than he has himself,' is a maxim,

says Chancellor Kent, 'alike of the common and the civil law, and a sale *ex vi termini*, imports nothing more than that the bona fide purchaser succeeds to the right of the vendor,' " 2 Kent's Comm. 324.

In *Barnard v. Campbell*, 55 N. Y. 456, the court said: "Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and even possession of a bill of lading, without the authority of the owner and the vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of like nature, may be evidence of title, and, in some circumstances and for some purposes, equivalent to actual possession of the goods, it does not constitute title, nor, of itself, affect the operation of the general rule, that property in chattels cannot be transferred except by one having the title or an authority from the true owner." See, also, *Gibson v. Tobey*, 46 N. Y. 637; *Kinsey v. Leggett*, 71 N. Y. 387.

In the case now before us, our conclusion is that, upon the facts specially found, the trial court did not err in its conclusions of law. The judgment is affirmed with costs.

UNITED STATES

v.

EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co.

(*U. S. Circuit Court, E. D. Tennessee. 1882.*)

Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than 28 consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., from a point within a state to another point therein, but only to such as convey swine, sheep, etc., from one state to another.

KEY, D. J.—This is an action for a penalty under sections 4386 et seq. The declaration alleges that defendant is a railroad company operating a line of railroad over which cattle, sheep, swine, and other animals are conveyed from Georgia and Tennessee to Virginia and other states; and that defendant received and loaded upon its cars at Limestone, Tennessee, a lot of swine consigned to Chattanooga, in said state; and that they did not have proper food, water, space, and opportunity to rest, and were confined for more than 28 consecutive hours without being unloaded for rest, food,

and water, and that in consequence the penalty of \$500 imposed by the statute has been incurred. Defendant demurs to this declaration upon the grounds—first, that the declaration shows that the swine were shipped within the state to a point within the state, and therefore the transaction falls not within the terms of the statute; second, if the terms of the statute embrace such a case the statute is unconstitutional, because it interferes with the internal commerce of a state, in so far as it applies to such a transaction as the one alleged in the declaration. So far as I know or am informed the questions raised under this statute have not been before our courts for adjudication.

I have been referred by the district attorney to *Hall v. DeCuir*, 95 U. S. 487, as bearing by analogy upon this case. In that litigation the state of Louisiana had passed a law for the regulation of the business of carriers of passengers within the state. This law had been disregarded by the defendant in that action, who was running a steamboat from New Orleans, Louisiana, to Vicksburg, Mississippi. The plaintiff had got upon the boat at New Orleans to be carried to a landing on the Mississippi River, called Hermitage, in Louisiana. The points of embarkation and destination, as well as the river between them, were in Louisiana. A judgment was rendered in favor of the plaintiff in the inferior court of the state, and affirmed upon appeal to the Supreme Court of the state, from whence it was taken to the Supreme Court of the United States and there reversed. The court say:

"The river Mississippi passes through or along the borders of 10 different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state would provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it would prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules and on the other side another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route, is a necessity in his business, and, to secure it, Congress, which is untrammelled by state lines, has been

invested with the exclusive legislative power of determining what such regulations shall be." 95 U. S. 439.

In the case at bar the State of Tennessee has enacted no law in respect to the subject matter of this contention. She has not entered the field of this legislation. It is occupied by Congress alone, and the case must stand or fall upon the proper construction of the terms of the Act of Congress. If the act, by its terms, does not embrace a shipment of swine from one point within the state to another within it, over a line entirely within the state, the action must fail, and the other point raised by the demurrer will need no consideration.

Section 4386 of the Revised Statutes says:

"No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, . . . shall confine the same in cars . . . for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours."

The first part of the paragraph describes the railroad to be affected by the statute as one forming a "part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another." This does not include and cannot include any other animals than such as are conveyed from one state to another. It is so limited by its plain, unambiguous language. When the statute prescribes the rule or regulation by which the railroad is to be governed, it says, "the same" shall not be confined, etc. The word "same" is here an adjective, and is defined to mean "not different or other; identical." If we supply the ellipsis in the sentence, the law will read: "No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, shall confine the cattle, sheep, swine, or other animals to be conveyed from one state to another for a longer period," etc. A simple grammatical construction of the language used, confines the duties imposed to animals conveyed over the line of road from one state to another, and has no reference or relation to such as are shipped within the state to a point therein over a road within its limits. This view of the case renders it unnecessary to consider the other point raised by the demurrer. Whether Congress has the power to impose duties similar to those embraced in this statute in respect to shipments of animals within a state over railroads of the state to points within it, does not arise. Congress in this statute, according to the view taken, has not attempted to do so.

The demurrer will be sustained and the bill dismissed.

See note, 7 Am. & Eng. R. R. Cas. 389.

SMITH

v.

ST. PAUL, M. AND M. RY. CO.

(Advance Case, Minnesota. January 26, 1883.)

The complaint in this case alleges that plaintiff, being a passenger upon defendant's railroad, "solely by the negligence of the defendant in the premises, the car in which the plaintiff was . . . being conveyed ran off the track at or near Minneapolis with great force and violence, and that the plaintiff was thereby grievously injured; that among the injuries so caused her ankle bones were broken, her leg injured, her nervous system was incurably injured, and she was otherwise injured."

Under these allegations it was competent to show any injury to plaintiff's person or health of which the derailment was the proximate cause. If alarmed by the peril apparently occasioned by the derailment, but acting as a person of ordinary prudence would in like circumstances in endeavoring to escape or avoid the same, she betook herself to the platform of the car and jumped or fell off, or was jolted off by the car's motion, or pushed or crowded off by fellow passengers in the excitement of the moment, any injury to her health or person occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment as its primary, proximate, responsible, and judicial cause.

In the circumstances mentioned the damages resulting directly and proximately to the person and health of plaintiff (considered simply as a person) from her fright and from her coming to the ground, whether by jumping or by any of the means before indicated, would be general, not special. General damages are not such only as must, *a priori*, inevitably and always result from a given wrong.

It is enough if, in the particular instance, they do in fact result from the wrong directly and proximately, and without reference to the special character, condition, or circumstances of the person wronged.

APPEAL from order of District Court, County of Hennepin, denying defendant's motion for new trial.

O. K. Davis, for respondent.

R. B. Galusha and Benton & Roberts, for appellant.

BERRY, J.—The complaint alleges that plaintiff, being a passenger upon defendant's railroad, "solely by the negligence of the defendant in the premises, the car on which the plaintiff was . . . being conveyed ran off the track at or near Minneapolis with great force and violence, and that the plaintiff was thereby grievously injured; that among the injuries so caused her ankle bones were broken, her leg injured, her nervous system was incurably injured, and she was otherwise injured." Under these allegations it was competent to show any injury to plaintiff's person or health of which the derailment was the proximate cause. If alarmed by the peril apparently occasioned by the derailment, but acting as a per-

son of ordinary prudence would in like circumstances in endeavoring to escape or avoid the same, she betook herself to the platform of the car and jumped or fell off, or was jolted off by the car's motion, or pushed or crowded off by fellow-passengers in the excitement of the moment, any injury to her health or person occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment, as its primary, proximate, responsible, and judicial cause. In law there would be no new or independent cause between the derailment and the injury. *Twomley v. R. R. Co.* 69 N. Y. 158; *Page v. Buckport*, 64 Me. 51; *Ingalls v. Bills*, 9 Metc. 1; *Stickney v. Maidstone*, 30 Vt. 738; *Frink v. Potter*, 17 Ill. 406. It follows that though, if practicable it might be advisable that the complaint should allege the fright and the manner in which the plaintiff was brought to the ground, in order to forestall any claim of surprise on defendant's part as a ground of continuance, such allegations are not only not necessary to the statement of a cause of action, but evidence of the fright or manner spoken of is not irrelevant, nor is proof of them a variance, or a failure to prove the cause of action alleged.

2. In the circumstances mentioned the damages resulting directly and proximately to the person and health of plaintiff (considered simply as a person) from her fright and from her coming to the ground, whether by jumping or by any of the means before indicated, would be general, not special. "General damages are such as the law implies or presumes to have accrued from the wrong complained of." 1 Chit. Pl. 395. They are frequently spoken of as necessarily resulting from the wrong. 1 Chit. Pl. 337, 395-6; 2 Greenl. Ev. § 254. This, however, does not mean (as defendant's counsel appears to argue) that general damages are such only as must, *a priori*, inevitably and always result from a given wrong. It is enough in the particular instance. They do in fact result from the wrong directly and proximately, and without reference to the special character, condition, or circumstances of the person wronged. The law, then, as a matter of course, implies or presumes them as the effect which, in the particular instance, necessarily results from the wrong.

3. The testimony in the case was such that it was quite possible for different minds fairly to arrive at different conclusions as to the responsible cause of plaintiff's injuries, and as to whether she acted with ordinary prudence in the premises. Its proper effect was therefore for the jury, and hence the verdict cannot be disturbed. In our view these considerations substantially dispose of the positions, taken by defendant's counsel in relation to the complaint, the evidence, and the instructions given the jury, though we have not deemed it necessary to discuss them in detail in this opinion.

4. With reference to the court's refusal to give defendant's

second and seventh requested instructions to the jury, we observe (1) that even, if correct in other respects, they are too narrow in confining the manner in which plaintiff came to the ground to that of jumping from the car; (2) that, irrespective of this defect, they are amply covered by the clear, full, and explicit instructions of the charge in chief.

Order denying a new trial affirmed.

GILFILLAN, C. J., on account of illness took no part in this decision.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY

v.

HENRY J. RECTOR.

(*Advance Case, Illinois. Sept. 28, 1882.*)

On an appeal to this court from the Appellate Court, in an action to recover damages for a personal injury from negligence or willful act of the defendant's servant, the facts will not be examined any further than may be necessary to an understanding of questions of law raised—as, for instance, the propriety of instructions based upon the evidence. The finding of the facts by the Appellate Court, in such case, is conclusive.

The purchase of a ticket by a person on a company's railway, between two stations, creates the relation of carrier and passenger between them, with all the duties the law imposes on each.

It is the duty of every railroad company to cause its passenger trains to stop at each station advertised as a place for receiving and discharging passengers, a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations, and it is the duty of passengers to exercise ordinary care for their safety in attempting to take passage on railway cars.

No degree of carelessness or negligence on the part of a passenger will excuse a wanton and malicious attack on him by the conductor or other servant of the railroad company. No matter how negligent a passenger may be for his safety, that will not warrant the infliction of a willful injury by a railroad employee.

In an action for damages against a railway company, the proof showed that the plaintiff, having a ticket, delayed getting upon the train until it had started and got under considerable speed, when he caught hold of the railing at the end of the rear car and stepped upon the bottom step, when he was swung round to the rear of the car, with his back toward it, and in an effort to recover himself swung back, and with his right hand took hold of the other guard rail, and while in that position, it was claimed he was wantonly and maliciously assaulted by the conductor. The court instructed the jury that if they believed, from the evidence, that plaintiff, under all the circumstances, in attempting to board the train acted as a reasonably prudent man would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by him resulting from the willful or wantonly malicious conduct of the servant of

defendant acting in the line of his duty, the defendant was liable for such injuries: *Held*, that while under some circumstances the principles of the instruction might be applicable, it was calculated to mislead the jury under the facts of the case tried.

Where an injury is wantonly and willfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrong-doer vindictive or punitive damages, by way of punishment for the wrongful act, but the party is not "entitled" to such damages as a matter of right, and it is error to so instruct, in any case. Whether the party may have such damages, rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment in this respect.

An instruction is vicious which ignores an important fact intimately connected with and affecting the plaintiff's right, or the extent of the defendant's liability, which the evidence tends to prove. Thus, where the plaintiff, in an action against a railroad company to recover for a permanent personal injury, including one to his spine, claimed to have resulted from an unjustifiable assault upon him by the conductor as he was attempting to board a car while in motion, the proof tending strongly to show that the principal injury, the one to his spine, was caused by a severe strain or wrenching of his body in attempting to get on the train, an instruction which ignores the fact that such injury might have resulted from his own imprudent act, should not be given. It should exclude from the jury all idea that there could be any recovery for injuries sustained by the imprudent attempt to board the car while in motion.

It is not sufficient, in such a case, that some of the defendant's instructions may have stated the law correctly on such branch of the case. The plaintiff's instructions should have done the same thing, so that the jury might not be misled by considering one set or the other of the charges given.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Fulton County; the Hon. S. P. Shope, Judge, presiding.

Mr. F. T. Hughes, for the appellant:

The facts amount to such culpable and willful negligence on the part of the plaintiff, as will preclude a recovery on account of contributory negligence. The statute makes it a criminal offence for any person to climb, jump, cling to or attach himself to a car in motion. *Field on Damages*, 167; *Chicago & Northwestern Ry. Co. v. Scates*, 90 Ill. 586; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Nichols v. Railway Co.*, 106 Mass. 463; *Harvey v. Railway Co.*, 116 id. 269; *Illinois Central R. R. Co. v. Able*, 59 Ill. 131; *Ohio & Mississippi R. R. Co. v. Schiebe*, 44 id. 460; *Illinois Central R. R. Co. v. Slatten*, 54 id. 133.

The appellee was doing an unlawful act. His injury resulted from that act, and if so, he cannot recover. *Wood on Master and Servant*, sec. 319; *Harris v. Hatfield*, 71 Ill. 310; *Bosworth v. Swanson*, 10 Metc. 363; *Heland v. Lowell*, 3 Allen, 408; *Illinois Central R. R. Co. v. Hetherington*, 83 Ill. 510.

If plaintiff was injured by the servant of appellant, it was outside of the employment of the servant. *Middleton v. Fowler*, Salk. 282; *Roe v. Birkenhead R. R. Co.*, 7 Eng. L. and Eq. 546; *Sotry on Agency*, sec. 456; *Angell on Carriers*, sec. 604; *Hilliard*

on Torts, 432; Cooley on Torts, 533; Wood's Master and Servant, 555; 2 Kent's Commentaries, 260; Thompson on Negligence, 885; Pierce on Railroads, 279; Bryant v. Rich, 106 Mass. 180; Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110.

The court erred in giving the tenth instruction, directing the jury to assess vindictive damages. McKinley v. Chicago & Northwestern Ry. Co., 44 Iowa, 321; Crocker v. Chicago & Northwestern Ry. Co., 36 Wis. 657; Pierce on Railroads, 305, 306; Field on Damages, 96; McKeen v. Citizens' Ry. Co., 40 Mo. 88; Goddard v. Grand Trunk R. R. Co., 57 Me. 202.

To hold the principal, who has done or authorized no wrong, liable for exemplary damages, is against the general principles of the law of exemplary damages. Wood's Master and Servant, 598; Cooley on Torts, 127; Shearman and Redfield on Negligence, sec. 601; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Hagan v. Providence R. R. Co., 3 R. I. 88; Turner v. North B. R. Co., 34 Cal. 594; Ken. & G. R. R. Co. v. Dills, 4 Bush. 593.

For all such acts as are outside the employment, and not ratified, only actual damages can be allowed. Crocker v. Chicago & Northwestern Ry. Co., 36 Wis. 657; Chicago & Rock Island R. R. Co. v. McKean, 40 Ill. 218.

Messrs. Gray & Waggoner, and Mr. L. W. James, for the appellee:

One who procures a ticket for a passage on the company's cars, is to be regarded as a passenger from the time he purchases the same, and it is the duty of the company to provide him a safe passage to his seat in the cars. Redfield on Carriers, 269, 352.

To all legal intent and purpose the conductor in charge of a train is, for the time being at least, the company itself, and said company is fully responsible for all his acts and doings within the scope of his power, express or implied. St. Louis, Alton & Chicago Ry. Co. v. Dalby, 19 Ill. 353; Toledo, Wabash & Western Ry. Co. v. Harmon, 47 id. 299; Illinois Central R. R. Co. v. Reed, 37 id. 508; Northwestern R. R. Co. v. Hack, 66 id. 239; Chicago, Burlington & Quincy R. R. Co. v. Dickson, 63 id. 157; Noble v. Cunningham, 74 id. 51; Chicago, Burlington & Quincy R. R. Co. v. Bryan, 90 id. 126; Chicago & Northwestern R. R. Co. v. Moranda, 93 id. 303; Goddard v. G. T. R. R. Co. 57 Maine, 202; A. & G. W. R. R. Co. v. Dunn, 19 Ohio, 162; Hanson v. N. A. R. R. Co., 57 Maine, 84; 1 American Railway Cases, Smith & Bates' notes, 127; Sleeth v. Wilson, 9 Carr. & Payne, 607; Bryant v. Rich, 106 Mass. 180; Coleman v. N. Y. & N. H. R. R. Co., 106 id. 160; Brokaw v. N. J. R. R. Co., 3 Vroom (N. J.) 328; Kline v. C. P. R. R. Co., 37 Cal. 327; Passenger R. R. Co. v. Young, 21 Ohio St. 518; Sherley v. Billings, 8 Bush. 147.

The act of the agent of appellant was wanton, willful and

malicious, and highly oppressive, and in such cases exemplary damages should be given. *Illinois Central R. R. Co. v. Parks*, 88 Ill. 375; *Chicago, Burlington & Quincy R. R. Co. v. Bogue*, 1 Bradw. 473; *Same v. Bryan*, 90 Ill. 126; *Hawk v. Ridgeway*, 33 id. 473; *City of Chicago v. Martin*, 49 id. 245; *Illinois Central R. R. Co. v. Hammer*, 72 id. 348; *Toledo, Peoria & Warsaw Ry. Co. v. Patterson*, 63 id. 304; *Atlantic & Great Western R. R. Co. v. Dunn*, 19 Ohio St. 162; *Pittsburg, A. & M. R. R. Co. v. Donahue*, 70 Pa. St. 119.

SCOTT, C. J.—This action was brought by Henry J. Rector against the Wabash, St. Louis & Pacific Railway Company and Theodore F. Kent, to recover for personal injuries. No service of process was had on Kent, and the action proceeded against the railway company alone. The facts necessary to an understanding of the questions of law to be considered may be briefly stated. Plaintiff desired to become a passenger on defendant's cars from Smithfield to Canton, and for that purpose purchased a ticket at the former station that would entitle him to become a passenger on defendant's road. It appears plaintiff delayed attempting to enter the cars until after the train was in motion, although plenty of time was allowed for that purpose, had he desired to do so. By the time he did attempt to get aboard, the train had acquired considerable speed. As the end of the rear car came opposite plaintiff, he caught hold of the rear guard-rail and stepped with one or both feet on the bottom step, and swung around to the rear of the car. The evidence tends to show a collision occurred between plaintiff and the conductor, who was attempting to board the train at the same time, and at the same platform. In an effort to recover himself plaintiff swung back, and with his right hand took hold on the other guard-rail, and it was while he was in that position, it is alleged he was wantonly and willfully assaulted by the conductor. The injuries sustained by plaintiff were very serious indeed, and no doubt of a permanent character. On the trial in the circuit court the jury returned a verdict for the plaintiff in the sum of \$14,000. After a remittitur of \$4,000 was entered, the court overruled defendant's motion for a new trial, and rendered judgment on the verdict for \$10,000. That judgment was affirmed in the Appellate Court, and defendant brings the case to this court on appeal.

With the facts of the case, further than they may be necessary to an understanding of the questions of law raised, this court will not concern itself. They have been ascertained by the Appellate Court, whence this case comes, and that finding is, of course, under the statute, conclusive on this court. Some further reference to the facts may be necessary to render the legal questions discussed intelligible in their application to the case. As has been

seen, plaintiff purchased a ticket on defendant's railway between two stations, and that fact created the relation of carrier and passenger, and the law imposed duties arising out of that relation, both on the carrier and the passenger. It is the duty of every railroad company to cause its passenger trains to stop at each station advertised as a place for receiving and discharging passengers, a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations, and it is the duty of passengers to exercise ordinary care for their safety on attempting to take passage on railway cars. These respective duties, as well as all others that tend to the security of passengers, neither party ought to omit.

No complaint is made in this case that defendant did not cause its train to stop at the station a sufficient length of time to allow all passengers that might wish to do so to get off or on its cars with safety. It is an admitted fact, plaintiff, although holding a ticket entitling him to passage, did not attempt to get aboard defendant's cars until the same began to move away from the station. After the cars were in motion, and had acquired considerable speed, plaintiff undertook to get on the cars by catching hold of the railing of the rear car, and while he was holding on to it with both hands as well as he could, he was injured by a violent assault made by the conductor, and was otherwise injured. It is at this point in the case the first serious error occurs in the action of the trial court in giving instructions for plaintiff. The first of the series is as follows: "If the jury believe, from the evidence, that the plaintiff, under all the circumstances, in attempting to board defendant's train, if he so attempted, acted as a reasonably prudent person would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by the plaintiff resulting from the willful or wantonly malicious conduct of the servant of the defendant acting in the line of his duties, the defendant would be liable for such injuries." Under some circumstances the principle of this instruction might be applicable, but it was calculated to mislead the jury under the admitted facts of this case. While this charge must be condemned in its application to the facts of this case, it must not be understood that any carelessness or degree of negligence on the part of a passenger would excuse a wanton and malicious attack on him by the conductor or other servant of the company. No matter how negligent a passenger may be for his safety, that would not warrant the infliction of a willful injury by a railroad employee.

The tenth charge of the series does not state a correct principle of law, and would be faulty in its application to any state of facts. It is as follows: "The court instructs the jury that if they believe,

from the evidence in this case, that the plaintiff in this case, having a lawful right to ride on the defendant's train, was, at and within the county of Fulton, and State of Illinois, wantonly, willfully and maliciously expelled from said train by the conductor thereof while in the exercise of his lawful or implied duty about the business of the railroad company, as the servant and agent of defendant, and that by reason of such act the said plaintiff then and there sustained actual, serious and permanent injury and damage, then the plaintiff is not limited in his recovery to such actual damages sustained, but the plaintiff is entitled, in addition thereto, to such additional damages as the jury may in their judgment assess by way of punishment for such act." The vice of this instruction consists chiefly in the fact it states the rule as to vindictive or punitive damages broader than the law will warrant. Where an injury is wantonly and willfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for such willful injury, but it is not understood the injured party is "entitled" to such damages as a matter of right, and an instruction that tells the jury, as a matter of law, the injured party is "entitled" to damages, goes too far, and is for that reason vicious. A party may recover the actual damages inflicted by the wrongdoer, but whether he may have damages in addition thereto, rests largely in the discretion of the jury, under the circumstances, and they should be left free to exercise their judgments in that respect. It was prejudicial error to tell the jury, as the court did in this charge, that plaintiff was "entitled" to such damages above the actual damages sustained. Such is not the law. It may be it was a case where the jury might give exemplary damages, but that was a question the court could not pass upon without invading the province of the jury.

But there is a vice common to most of the instructions given for plaintiff that must have been hurtful to the defence. Many of them ignore the fact the evidence tends to establish, viz., that plaintiff might have been injured otherwise than by the violence of the conductor. Whatever injuries he may have suffered other than from the assault of the conductor, were attributable to his own negligence, and for which defendant was in no way responsible. That which most seriously affects plaintiff, is some kind of an injury to the spine, and all the physicians say the injury of which he complained most might have been produced by a strain or wrenching of the body. One of them says it might "result from a very bad strain or twist of the body," and another, "that it might be produced by a very powerful twist or wrench of the body." The description given by plaintiff of the transaction, shows he must have sustained a very severe strain or wrenching of the body in the attempt to get on the train when in motion. His

own account is, that when he caught hold of the railing he "swung clear," and had great difficulty in regaining his balance. A witness near at hand, and who saw all that took place, says plaintiff "stepped on the car and swung around with his back to the back end of the railing." All the witnesses agree the train had acquired considerable speed before plaintiff attempted to get aboard of it, and there must, of necessity, have been a strain more or less severe to the body. Whether plaintiff was injured in that way, was a question that ought to have been more definitely submitted to the jury. The instructions should have excluded from the jury all idea that there could be any recovery for injuries sustained by plaintiff on account of an imprudent attempt to board the train when in motion, other than that produced by the wrongful conduct of defendant's servants in charge of the train. That the instructions did not do, and the error in this regard may account in some measure for the unusually large verdict rendered. It is not sufficient in a case of this kind that some of defendant's instructions may have stated the law correctly on this branch of the case. Plaintiff's instructions should have done the same thing, so that the jury could not have been misled by considering one set or the other of the charges given.

There may be slight errors in other instructions, but they have not been deemed to be of sufficient importance to be remarked upon. On another trial the circuit court will make the instructions conform, as near as may be, to the views expressed in this opinion.

The judgment of the Appellate Court will be reversed, and the cause remanded, with directions to reverse the judgment of the circuit court, and remand the cause for a new trial.

Judgment reversed.

BROWN

v.

THE GREAT WESTERN RAILWAY COMPANY.

(L. R. 93 B. Dis. 744. May 15, 1882.)

The W. Company by their original Act were authorized to charge reasonable rates for the conveyance of passengers. By a subsequent Act the company were empowered to extend their line, and to charge a lump sum for carrying passengers over that extension. A third and later Act allowed the W. Company to amalgamate with another company, provided that they reduced their charges to the same scale as that of the other company. That scale was one penny a mile for each third-class passenger. The plaintiff travelled over the line of the W. Company with a third-class ticket, and was charged as his fare at more than the rate of one penny a mile. In the course of his journey he traveled over the extension. The W. Company also charged the company with the government duty:—

Held, that the W. Company were not entitled to charge the plaintiff more than one penny per mile, but that they were entitled to charge him with the government duty.

By one of the clauses in an Act relating to the W. Company they were forbidden to take tolls, unless milestones were maintained along the line; and another Act relating to the W. Company incorporated the Railways Clauses Consolidation Act, 1845, which, in s. 95, contains a similar provision:—

Held, that the word "tolls" related to tolls properly so called, and did not extend to charges for carrying passengers in the company's own carriages.

SPECIAL CASE stated pursuant to a master's order.

The plaintiff on the 6th of November, 1880, applied at the defendants' station at Paddington for a third-class passenger ticket from Paddington to Bristol, and the plaintiff tendered the sum of 9s. 10d. for the ticket. The defendants' booking-clerk declined to issue the ticket unless upon payment of the sum of 10s. 6d., being the defendants' usual charge for similar tickets. This sum the plaintiff paid under protest, and he thereupon received a ticket and traveled by the defendants' train from Paddington to Bristol.

The plaintiff on the 4th of November, 1880, applied at the defendants' station at Bristol for a third-class passenger ticket from Bristol to Paddington, and the plaintiff tendered the sum of 9s. 10d. for the ticket. The defendants' booking-clerk declined to issue the ticket unless upon the payment of the sum of 10s. 6d., being the defendants' usual charge for similar tickets. This sum the plaintiff paid under protest, and he thereupon received a ticket and traveled by the defendants' train from Bristol to Paddington.

The distance from Paddington to Bristol and from Bristol to Paddington was agreed to be 118 miles and a fraction of a mile less than half a mile. On the 6th of November, 1880, there were milestones between Paddington and Bristol, but no milestone or

post or other object at the 118th mile from Paddington, or at the quarter mile after that.

The trains by which the plaintiff travelled ran on six days in every week: they were ordinary and not express trains. They did not stop at every ordinary passenger station; they were not market trains. The defendants did in November, 1880, run one train each way daily on every week-day in accordance in all respects with the Cheap Trains Acts (7 & 8 Vict. c. 85 and 21 & 22 Vict. c. 75), and no passenger duty was claimed from or paid by them in respect of such parliamentary or cheap trains. The sum of 10s. 6d. for the journey between Paddington and Bristol was at a rate greater than one penny a mile.

The questions for the Court were whether the defendants were entitled to charge, first, for the fraction of a mile beyond 118 miles as for one mile; secondly, for passenger duty the amount charged by the government; thirdly, the special charge authorized by 1 Vict. c. xcii. ss. 42, 43.

1881. Nov. 5, 30. The plaintiff in person.

R. E. Webster, Q. C., and R. S. Wright, for the defendants.

The arguments are sufficiently stated in the judgments.

FIELD, J.—This is an action brought to recover back from the Great Western Railway Company either the whole or a portion of two sums, which the plaintiff has paid in respect of his being carried by the company from Bristol to London and back again. The facts were that on a certain day he went by the third class, and traveled from Bristol to Paddington, and this fare was 10s. 6d. He paid the money under protest, and then he also had a return journey for exactly the same fare, which he also paid under protest. He made an application to the Railway Commissioners for a prohibition calling upon the Great Western Railway Company to discontinue receiving more than the maximum fare, which they were authorized to receive. The commissioners proposed to entertain it, but on an application to this Court, my brother Manisty and I, who were sitting here, considered it was beyond their jurisdiction, and we granted a prohibition, which has been upheld in the Court of Appeal. 7 Q. B. D. 182. We pointed out in our judgment that the proper remedy for the present plaintiff was to come to a court of law if he had any complaint to make. The plaintiff has followed our suggestion, and has proceeded to bring an action against the company to recover what he says are overcharges in respect of the two journeys which he has made. He seeks to recover either his whole fare, or else such portion of it as may amount to an overcharge. Now, the distance is about 118½ miles from Paddington to Bristol, and it turns out that at the time when the fare was taken there was no milestone at the 118th mile, nor was there a milestone at the quarter of a mile beyond the 118th

mile. The train in question was an ordinary train, it ran six days a week, it did not stop at every station, and was not a market train. The point has not been raised about its being a cheap train, or if it was raised it was abandoned.

The first question does not seem to have been stated, but the facts raise it, and we are anxious to go into everything, so that the plaintiff and the company may have our judgment upon every point. The question was whether, in consequence of the absence of the stones or posts at the 118th mile and at the quarter of a mile beyond, the railway company were justified in making any charge to anybody. The consequences would have been very serious if we had been compelled to hold that the company were debarred from making any charge; but we think that the circumstance that there were no milestones at those two points does not prevent the railway company from recovering the fares which they would otherwise be entitled to. As the plaintiff has pointed out, in a clear and sensible argument while commenting upon the original Great Western Act of 1835 (5 & 6 Wm. 4, c. cvii.), the legislature in passing the early railway Acts did not foresee what the future of railways was to be. It was at that time thought that railway companies were to make their profit by charging for other persons' trains, or by allowing other persons' engines and trains to run upon their lines, and the consequence of that was that the Great Western Company have most minute provisions as to their maximum fares in the original Act, all of which, with one exception, are applicable to that supposed use of the railway. But it has turned out in practice that that system could not be worked. I recollect that it was tried in the midland counties. I recollect the mine owners trying to compel the Manchester, Sheffield and Lincolnshire Railway Company to allow them to run their engines to carry coal, but as there were no facilities for getting water or for the stoppages of trains, and as there were no pointsmen or other servants, it was found utterly hopeless to do anything else than allow the company to carry the coal in their own trucks in their own manner, and for this reason, that the person who has the command of the undertaking is the best person, and the person most likely to carry on the business carefully. The railway companies, immediately the Acts came into operation, became carriers themselves, and the legislature had foreseen that that might happen, because as well as the maximum clause for tolls and rates they had inserted a clause that the companies might carry for themselves, and they imposed upon them the ordinary liabilities of carriers, that is, that they were to carry at reasonable charges. That was how the matter stood at the time when the Act of 1835 and the Act of 1837 (1 Vict. c. xcii.) were passed.

The consequence of this state of matters was that there were, as it were, two series of provisions in the Act, one affecting what is

called the use of the railway and the other affecting the carrying by the company of passengers and goods over the railway as carriers, and it is important to keep that distinction in mind for the purpose of the decision which we are called upon to pronounce. The ground on which Mr. Brown relies for claiming to have back the whole of his fare is that by the 177th section of the Act of 1835 (5 & 6 Wm. 4, c. cvii.) the legislature has said that the company shall paint a list of the tolls and fares on boards. In s. 173, after enacting that in all cases where there shall be a fraction of a mile, a fraction of a mile shall be deemed a quarter, the legislature has added that to ascertain with greater facility what the amount shall be, the company shall put milestones at every quarter of a mile. There is also a provision with the like object that they shall paint their tolls on boards at certain places. That is s. 177. Then comes s. 178, upon which the plaintiff founds his case, which prohibits the company from taking any rates or tolls for any article or passenger so carried or conveyed along the railway, except during the time the boards and stones shall be painted and affixed. That was the private legislation. There are other clauses which shew what the object of that was, but they do not affect the particular question. Besides the private legislation there was also passed a well-known Act of general legislation, which is the Railways Clauses Consolidation Act, 1845. It would seem reasonably clear, I think, that as regards the local Act the prohibition of receiving tolls and rates was by the very language of the Act limited to tolls and rates such as are fixed by the statute, and did not extend to the reasonable charges which the company as carriers were entitled to. It was limited to the tolls and rates which they were about to charge for the purpose of conveying other persons' carriages either with or without their own locomotives. Mr. Brown very properly seeks to found his case upon that general Act as well as upon the private Act. The general Act is 8 and 9 Vict. c. 20, and it contains various sections which it will be advisable to refer to. The first material enactment is s. 90. There is a series of sections beginning with s. 86, and the series goes down below those which we have to deal with. The railway companies may employ locomotive power and contract with other companies; they are not to be liable beyond the liability of carriers. Sect. 90 says that a railway company may vary their tolls, but they must be charged equally. Then s. 92 says, "It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods than they are by this and the special Act authorized to demand; and upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway." I refer to these words particularly, because they will be found later on in the section which the plaintiff cites in support of his claim for relief. Then comes the

provision that the list of fares and tolls is to be painted on a board, and then comes this provision, s. 94: "The company shall cause the line of the railway to be measured, and milestones, posts, or other conspicuous objects to be set up and maintained along the whole line thereof, at the distance of one quarter of a mile from each other, with numbers or marks inscribed thereon denoting such distances." Now comes the clause on which the plaintiff relies in support of his case, s. 95, "No tolls shall be demanded or taken by the company for the use of the railway during any time at which the boards hereinafter directed to be exhibited shall not be so exhibited, or at which the milestones hereinbefore directed to be set up and maintained shall not be so set up and maintained." In the present case the plaintiff was not a person using the railway in the sense in which those words are used. He was being carried by the company in their capacity of carriers. The consequence of that is, first of all, that he did not come within the sections of the local Act, and with regard to the general Act we think also he does not come within that. The words are, "No tolls shall be demanded or taken by the company for the use of the railway. If that stood by itself, it might be that we should have held that the toll there mentioned was still only the toll or rate which was referred to in the local Act; but the plaintiff properly said, "No, that is not so; because if the definition clause of the Railways Clauses Consolidation Act, 1845, is looked at, it will be found that the word 'toll' has a larger meaning than that." He says it has that larger meaning in s. 95, and he founds that upon s. 3, the definition clause, which defines "tolls" thus: "The word 'toll' shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway." But then it must be recollected that that meaning is given subject to the preamble, if I may use the word, of that section, and that is in these words: "The following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction." Therefore before we can give to the word "toll" the large and broad meaning which it is competent to give it under the definition clause, we have to look at the words of the section in which it is used and see whether there is anything in the subject or context repugnant to the construction contended for, and we think that there is. We think that the words in s. 95 are repugnant. If the word "toll" stood by itself it might not be so, but the toll is to be "for the use of the railway." On principle, therefore, if we had to construe this Act for the first time, that would have been our decision; but we think also that the case is covered by authority as well. The authorities are to the following

effect. I think that the earliest case that was cited on the part of the company was the case of *Garton v. Bristol and Exeter Ry. Co.*, 30 L. J. (Q. B.) 273. In that case the point raised was with regard to the boards, but it turned upon the local Act of Parliament and not upon the Railways Clauses Consolidation Act, 1845, and therefore it is only an authority as to the extent of the construction which was put upon the sections of the local Act of Parliament. The next case was *Wallis v. London and South Western Ry. Co.*, Law Rep. 5 Ex. 62. There the question did not arise under s. 95, as this one does, but it arose under s. 97, which says this: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to retain and sell such carriage, or all or any part of such goods." And the Court of Exchequer in that case held that carriers' charges were not tolls within the meaning of the 97th section, and they arrived at that construction by holding that the 97th section must be read together with the 95th, 96th, and all the series of sections applicable to it. Consequently the 97th section must be read as if the words "for the use of the railway" had been included in it. Now a similar question very soon afterwards arose in the Scotch courts, and the first case that arose was a case under the corresponding section to the 97th, and it was taken for granted that "tolls" did include carriers' charges as well as charges for the use of the railway. Then later on in a case which occurred afterwards, the *Galedonian Ry. Co. v. Guild*, 1 Sc. Dec. (4th series), p. 198, the court expressed its disapproval of the decision in *Wallis v. London and South Western Ry. Co.*, Law Rep., 5 Ex. 62; but then it limited that disapproval to this point, that it thought the Court of Exchequer had gone wrong in holding that the 97th section was to be read in conjunction with the 95th section, so as to alter its construction. It was distinctly held under the 88th section of the Railway Clauses Consolidation (Scotland) Act, 1845, (8 and 9 Vict., c. 33), corresponding to the 95th section of the Railways Clauses Consolidation Act, 1845, that the words "for the use of the railway" had that meaning, and consequently if the Court of Session had had to decide the question under the 88th section, which is the one that corresponds with the 95th section, it would have been decided differently; but the court only had to decide it under the 90th section of the Scotch Act, and it was held that the 90th section in this Act was separable from the 88th, and therefore it was held that the company had the lien which they claimed to have in respect of their carriers' charges. Therefore we have come to this result, that upon principle the meaning of the legislature is clear, that this prohibition to receive tolls only applies to cases where the person who claims to travel free is using the railway by his own carriages, and does not apply to the case where the traveler is car-

ried as a passenger. I may mention that 8 and 9 Vict. c. 20, is incorporated by 10 and 11 Vict. c. ccxxvi. s. 2, hereafter commented upon.

In construing Acts of Parliament, we must look at what was the object of the legislature. It was supposed that persons would travel up and down the railway with their own engines and carriages, and the legislature thought it well, in order that there should be no dispute as to the tolls to be paid, that the persons using the railway should be able to see how much they were. Perhaps the legislature thought it well that ordinary passengers should have the same facility, but if they did think so they have not said so, and we cannot import words into the Act. They have used language which does not apply to the present case. Upon that first point, therefore, we decide against the plaintiff. We decide that the absence of the mile-post at the 118th and 118½ miles did not prevent the company making charges for carrying passengers, and therefore the plaintiff cannot recover back from them the fares paid by him.

The second point arises in a remarkable manner. The Great Western Railway Company, by their scheme of 1835, were not to come to London itself. They stopped short at Acton. At Acton they had the advantage, as they thought at the time, of saving 5½ miles by effecting a junction with the London and North Western Railway, which company had previously got their bill. At that time the powers which they took were powers to run and join the London and North Western Railway at Acton, that being from Bristol a distance of 113 miles. Two years afterwards they found out the hopelessness of being able to carry all the traffic of the west and the traffic of the north into one station, and they determined to make the additional piece of line from Acton to Paddington. In 1837 they obtained that authority from Parliament which enabled them to fill up the remaining 5½ miles (1 Vict. c. xcii.). Their original Act contained the scale of charges they were entitled to make, and it is to be remarked it was the ordinary scale; they had a regular scale of charges fixed. The new Act which gave them the extension into London did not give them a scale of charges, but what it did was this. By the preamble to one of the sections (41), it is stated, what of course would be the fact, that this bit of line was very expensive to make: the company had to come through property of a very valuable character, and ought not to be put upon the same scale of tolls as exists in respect of the 113 miles; and the short result of it was that the legislature allowed them to charge a lump sum not to exceed two shillings for the whole distance of the 5½ miles (s. 43.) The plaintiff does not dispute that if that Act had not been repealed the company would have been justified in charging even more than they have charged, but he says that that Act has been repealed.

That is the question which we have to decide. He does not say it has been expressly repealed, but he relies upon the well-known principle of law, that if an Act of Parliament is passed containing clauses which are repugnant to and inconsistent with prior legislation, the legislature cannot have two minds at one and the same time, and therefore the subsequent mind must alter the first mind. Therefore, if even in an affirmative Act there is a clause which is repugnant to and inconsistent with a previous Act, the two cannot stand together; the subsequent Act repeals the prior Act, and, *a fortiori*, when it is negative. It seems to me that these Acts may be considered as negative; the Act of 1835 enacts that anybody may travel, but the company shall not charge him more than is reasonable. The Act of 1837 provides that any person may travel $5\frac{1}{4}$ miles, and the company shall not charge him more than two shillings; that shall be a maximum charge. Later, the Great Western Railway Company proceeded on their voyage towards Liverpool as far as they could get, and they got hold of the Birmingham and Oxford and Birmingham and Dudley lines and the lines of other railway companies. The Great Western Company could take them only upon a term, which the legislature seems to have put in some of the bills. It was this, that they should not be allowed to exercise their powers or carry out their amalgamation with the Birmingham and Dudley Junction unless they consented to reduce their tolls to the same scale of charges as that of the Birmingham and Dudley Junction (10 & 11 Vict. c. ccxxvi.), s. 47. The plaintiff contends that the effect of that is to repeal this lump maximum of two shillings over the $5\frac{1}{4}$ miles of railway. We have come to the conclusion, that he is right. What is the language of the act? It is that the tolls to be charged shall be reduced to the same scale as those of the Birmingham and Oxford Junction. The counsel for the defendants urged with great ability that this provision could not refer to the lump charge. It is contended that there is a scale in 5 and 6 Wm. 4, c. cvii, but there is no scale in 1 Vict. c. xcii., for the company is allowed a charge of 2s., and no scale is given. It is contended upon this ground that the legislature cannot have meant to abolish it. The statute 1 Vict. c. xcii. is recited, and there is no express repeal. But after all the general intention of the legislature seems to me to be quite clear. There was a company, originally a modest company, going only to Acton; afterwards it goes into London, and afterwards it has branches throughout the west of England. Then it becomes the great undertaking which we now know as the Great Western Railway Company, and then comes 10 and 11 Vict. c. ccxxvi., which the plaintiff relies upon, and which says that this great undertaking called the Great Western Railway is to have a uniform charge. I think that was the meaning and intention of the legislature. Under those circumstances it seems to me that

the plaintiff is very well founded in his contention, and that the 2s. charge is no longer payable since that Act was passed. It seems to me inconsistent with the meaning of that Act that the defendants shall be entitled to charge this lump sum of 2s., especially when it is remembered that that Act insisted on the Great Western Company reducing their tolls to the rates charged on the Birmingham and Oxford Junction, and if this sum of 2s. were charged it would give them a considerable sum beyond that. This disposes of the second point.

We have now to consider the third point, which is how much they are entitled to charge for? The absolute distance from Paddington to Bristol is over 118 miles. The earliest legislation said that for every fraction of a quarter of a mile they might charge a quarter of a mile. The distance is 118 miles and something over a quarter and less than a half; the question which we thought important to be argued was, whether it being over 118 miles, it was not equal to 119 miles. The company say, and say truly, they are entitled to charge for a fraction of a mile as a mile. Those are the enacting words of the 51st section of 10 and 11 Vict. c. cxxvi., which was the Act which reduced the tolls, and in that very Act the legislature said, whilst reducing the tolls to the Birmingham and Dudley Junction rate they still permitted the company to charge a fraction of a mile as a mile. We therefore think the total distance to be calculated on the Great Western Railway from Paddington to Bristol is 119 miles. The result of that is this, that the company being entitled to add the government duty they pay, Mr. Brown has been overcharged to the extent of a fraction more than three farthings each way. Therefore the judgment is for 2d., but he is entitled to 2d., and 2d. we must give him.

NORTH, J.—I take the same view, and I wish very shortly to state the way in which it strikes me.

As regards the question about the milestones under 5 and 6 Wm. 4, c. cvii., certain clauses refer to the taking of charges. A distinction is recognized by the Act itself between the rates and tolls which are charges for conveyance in carriages not belonging to the company on whose lines the articles or things are being conveyed on the one hand, and the charges for conveyance by that company where they are acting as carrier on the other hand. Now, as regards the question of the milestones, s. 173 provides that in any case where there is a fraction of a ton conveyed, or the distance for which an article or a person is conveyed is less than a mile, the fractions are to be charged for, and a provision is made for the purpose of ascertaining the distance for which rates or tolls are to be demanded, and the company are to put up and maintain mile stones at every quarter of a mile. That has not been done in this case. Then s. 178 provides that it is not lawful for the company to de-

mand or take any tolls of rates unless the milestones with the proper inscription thereon, which are directed to be set up every quarter of a mile, are kept in their places. That applies to rates and tolls only, and does not apply to the case in which charges are being received, that is to say, it does not apply to a case like the present of a person being conveyed by the company themselves along their own line. That seems to me clear from the construction of those clauses and also from the decision of the Court of Queen's Bench in *Garton v. Bristol and Exeter Ry. Co.*, 30 L. J. (Q. B.), 273. Upon this point reference was made to the Railways Clauses Consolidation Act, 1845, which deals with a similar matter in somewhat different terms, and of course, it might be under that Act that certain duties were imposed upon the company which did not exist before. We decide in the defendants' favor as regards their Act, but that public Act has also received judicial decision in *Wallis v. London and South Western Ry. Co.* Law Rep., 5 Ex. 62, and the same conclusion was arrived at there on that Act, s. 95 of which corresponds to s. 178 of the defendants', and it was there decided that the section applies merely to cases where persons or goods are being conveyed by other persons than the company upon the line, and not to where the persons or goods are being conveyed by the company itself. That disposes of the milestone question, which does not apply to the second point in this case.

Now, the second question is with respect to the 2s. charge by the defendants. That stands shortly in this way: by s. 47 of 10 and 11 Vict. c. ccxxvi., a reduction of tolls and charges is contemplated so as to compel the Great Western Ry. Co. to equalize their rates, tolls, and charges with those of another railway company. Then s. 49 says, what are to be the maximum rates charged by the Great Western Ry. Co., and in the case which we are now dealing with, the maximum rate of charge made by the company for the conveyance of passengers along their railway is, for every passenger conveyed in a third-class carriage by any such train as the plaintiff was being conveyed by, the sum of 1d. per mile. The argument on behalf of the company, when reduced to its simple element, was this, that by reason of some other Act they had power to charge not only a penny a mile, but any other sum they pleased not exceeding two shillings. That seems to me to be directly inconsistent with the terms of this Act, where it says the maximum charge shall be a penny a mile, for the conveyance of passengers in third-class carriages in a train, which is not an express train. It seems to me if that does not directly repeal the previous Act, which says that a charge of two shillings may be made, the effect would be to make the sum charged by the company more than the maximum charge.

The third and the only remaining point is with respect to the fraction of a mile. As to that, as I understand, the plaintiff's

argument is, that inasmuch as certain other companies whose charges were the same as those made by the Great Western Ry. Co., or rather to whose level the Great Western Ry. Co's charges were to be reduced, did not charge as much as a penny for a fraction of a mile by reason of 9 and 10 Vict. c. cccxv., the Great Western Ry. Co. are bound to reduce their charges to the same level. I do not follow that argument, and I should require to know more about it before deciding in the plaintiff's favor upon that point. But even if he is right in that, what I do find is this, that even if under 9 and 10 Vict. c. cccxv., the company could only charge for a full mile, by 10 and 11 Vict. c. ccxxvi. s. 51, the Act of the following session, they are clearly empowered to charge for any fraction of a mile beyond six miles or beyond any greater number of miles as for one mile. Therefore, if the two provisions of the two successive years are inconsistent, what we are bound to do is, not to follow the plaintiff's invitation and to say, because the later Act is inconsistent with the earlier Act, the later Act is to be rejected, but to say if the later Act is inconsistent with the earlier Act the earlier Act is to be rejected. The later Act seems to me to be clear upon the point, and to entitle the company to demand and take the toll for a whole mile instead of a fraction of a mile.

Judgment for the plaintiff for 2d.

The defendants appealed, and the plaintiff gave a cross notice of appeal.

1882. May 15. Webster, Q. C., and R. S. Wright, for the defendants in support of the appeal.

The argument is sufficiently stated in the judgments.

The plaintiff in person was not called upon to argue.

JESSEL, M. R.—I think that the judgment of the Queen's Bench Division must be affirmed. The decision turns upon a very small point. The simple question is, what is the meaning of the term "the Great Western Ry.," when used in the Act of 1847. An Act was passed in 1835, in which there are rates and tolls. The first section to be referred to is the 163rd, which provides that any person may use the railway on payment of the rates and tolls. By the 164th section the company were entitled to take a toll strictly so called, that is, a toll from persons using their own carriages and locomotives; that relates to goods; and in s. 165 there was a similar power to take tolls for passengers, beasts, cattle, and animals. The 166th section empowered the company to provide locomotive power for those persons who supplied their own carriages and wagons, and as regards the locomotive power they were to supply it on any terms they thought proper. It had nothing to do with a mileage rate. Then by the 167th section the company were authorized to be carriers, and to provide both locomotive power and carriages, and they were not limited to charges, except that

they were to make reasonable charges, and that they were not to charge for the conveyance of passengers more than 3½d. a mile. The next Act of Parliament to which it is necessary to refer was to enable the company to extend their line from Acton to Paddington (1 Vict. c. xcii.), and it is called "An Act to enable the Great Western Ry. Co. to extend their line." The first clause enacts that every provision referring to the railway shall, except such as have been repealed, extend and be construed to extend to the new piece of line, and then it empowers the company to make the extended piece of line; and by the 41st section it is enacted that "whereas the company will incur a great additional expense in extending the said railway to Paddington," they shall be entitled to charge for that five and a half miles of the line in lieu of the rates authorized to be demanded by the first-recited Act, lump-tolls, as they were called, for the whole distance. The 43rd section entitles the company to make a reasonable charge for supplying locomotive power; but I take it that by s. 43 the right of the Great Western Ry. Co. to act as carriers between Acton and Paddington is clear beyond question, that is, they might make any charge they thought fit to make or could get paid, subject to the limit as to passengers. The result appears to me, looking at the Acts as they stand, to be this, that the Great Western Railway main line was extended to Paddington, that as to the part of the line between Acton and Paddington the company had a right to charge a lump sum for toll not exceeding 2s. for a passenger, any sum that might be reasonable when they supplied locomotives, but that as regards the rest of the line they were limited as to tolls and rates. I believe the fact to be that in strictness the mileage charges never came into existence, and that the company from the beginning acted as carriers. Under the provisions of the Act they were to charge what was reasonable, with the limit as to passengers. It must be borne in mind that there was no other limit at that time on the rate of charges when they acted as carriers; practically there was no limit.

Matters being in this state, an Act of Parliament was passed to enable the Great Western Railway Company to amalgamate themselves with two other railway companies, on the terms that their tolls should be reduced. Recollecting what I have said, we must turn to the other Acts. The Great Western Railway had power to charge what they thought reasonable as carriers, and they had then the power to charge mileage rates. Therefore if the argument were to prevail that this provision applies only to tolls which can be charged according to mileage, it would not affect the Great Western Railroad Company, because they always act as carriers. But it is plain to my mind that it applies to the whole line, and that the provision was introduced to prevent the company, even when acting as carriers, from charging what they like. The words

of the section relied upon (10 & 11 Vict. c. cccxvi. s. 47) appear to me reasonably to that effect. It recites that the companies are not to amalgamate, unless and until the tolls and charges on the Great Western Railway shall have been reduced to a scale not exceeding the tolls and charges authorized for the lines. For tolls there was a maximum, but for charges there was none. They might charge anything that was reasonable when they acted as carriers, and anything which might be agreed upon when they furnished locomotive power. When I say "anything reasonable," of course I mean that the law would make a carrier charge a reasonable sum. It is provided by s. 47 that "the scale of tolls and charges by this Act authorized to be demanded and taken on the Great Western Railway shall be," &c. I have no doubt that this expression means the whole line from Paddington to Bristol. No other description is to be found anywhere. It is not a mere inference. The piece of the line from Acton to Paddington is nowhere called by any other name, and I have no doubt that that is the proper meaning of the term. The section provides for a reduction in the scale of tolls and charges, and it is then enacted by a negative clause, "that from and after the transfer of the said undertaking or any part thereof to the Great Western Railway Company, it shall not be lawful for the Great Western Railway Company to demand and receive in respect of the use of the Great Western Railway and the branch railways by this Act authorized to be made by parties using the same, either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where the company as hereinafter provided may consent to supply carriages)" certain tolls which are mileage tolls. Then s. 48 provides that "the toll which the company may demand for the use of engines for propelling the carriages of other parties on the said railway shall not exceed" a mileage rate. So that we have a mileage rate substituted for that which was not a mileage rate. Sect. 49 provides that "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the said railways and of carriages, and for locomotive power and every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums." That is a carrier's charge, and that carrier's charge was a mileage charge on the other railways, but was not a mileage charge on the Great Western Railway. It is to be said that it is not to apply to the whole of the Great Western Railway? The argument, if it is worth anything, goes too far, because as it was not a mileage charge on any part of the Great Western Railway, the company would be left out altogether, and as in practice they acted only as carriers, it would have no effect upon them. That appears to me impossible, and the section must mean to restrict the charge of the company as carriers to the same charge

as the other railway companies could make as carriers. I entirely agree with the decision of the Queen's Bench Division, and on consideration of the statutes I think it as clear a case as ever I have seen.

BRETT, L. J.—I think that it cannot be denied that if the two phrases in 10 & 11 Vict. c. ccxxvi. ss. 47, 49, "in respect of the use of the Great Western Railway" and "the said railway" include the line from Acton to Paddington, each of those two sections deals with the sums which may be paid under the Act of 1837 as a lump sum in respect of the conveyance of passengers between Acton and Paddington. If those two phrases include that part of the line, then inasmuch as there is that enactment in the Act of 1837, although the lump sum is there called a toll, and certainly is a rate or charge, in s. 47 that toll is included, although it is a lump sum, and in s. 49 that toll is included in the words "rate or charge." That view was hardly contested. Mr. Webster's contention was that the part of the line between Acton and Paddington was not in s. 47 included within the term "the Great Western Railway" and was not in s. 49 included in the term "the said railway." Therefore his argument was that the term "the Great Western Railway" really means only the Great Western Railway from Bristol to Acton, although he admits that it includes more than the original Great Western Railway. It includes everything that has been amalgamated with it, whatever the name was before, and the only part of the whole system that he desires to exclude from that term is the piece between Acton and Paddington. Where is it that this term "the Great Western Railway" first appears? In truth, it first appears in the title of the original Act, which is "An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'the Great Western Railway.'" I do not think that any section in the Act says that that shall be the name of the railway, but it seems to me that it is treated through the whole Act as the name of the railway, which was thereafter to belong to the Great Western Railway Company (s. 1). If that was the name of the railway under the Act of 1835, what is the name of the railway which was dealt with, or rather constituted by the Act of 1837? The very first section recites the title of the Act of 1835. It recites that it was "An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'the Great Western Railway.'" Then it goes on to exact that all the powers, authorities, provisions, matters, and things contained in the said recited Acts shall be construed to extend to this Act. If it was a provision, as I think it was, of the Act of 1835, that the railway thereby constituted should have the name of the Great Western Railway, I think that under those words that provision was carried on by the Act of

1837 and applied to the railway constituted by it, which was the original railway extended from Acton to London. So that by the very first section of the Act of 1837, the Great Western Railway is extended to and forms that part of the line which goes from Acton to London, and it makes the whole one line. Moreover, if there had been nothing to the contrary, all the powers which were given to the railway company with regard to the line to Acton are given to them in respect to the line from Acton to London, and if there had been nothing to the contrary in the Act of 1837 it seems to me that they would have been entitled to apply the same tolls to the new part of their line, as they were entitled to demand in respect to the former part, because the new line would have become part of the old line. But then came the 41st and following sections in the Act of 1837, which limited or rather altered that power and gave another, and these sections show exactly what the legislature meant; the legislature in effect said that in lieu of exercising the powers over this part of the line given by the first Act, the company should in respect of that part be entitled to charge a specified maximum rate. The line was treated as one line. Upon the construction of that Act there were for all parts up to Acton certain rates, there was for the use of that part of the line from Acton to London a fixed sum. If it be true that in that Act the whole part up to London is to be called "the Great Western Railway," it seems to me to follow that in every part of the Act of 1847, where reference is made to "the Great Western Railway," it includes this part from Acton to London. As I said before, it is admitted that that term includes everything else, even the two railways which the company were enable to purchase and amalgamate with by that very Act: it includes them, and includes everything which the company had incorporated or amalgamated with before; yet it is said that the phrase does not include this particular piece from Acton to London. Upon consideration of the whole matter it seems to me that that cannot be the true construction, and therefore that the reference to the "Great Western Railway" includes the distance from Acton to London; and if that is so, it is hardly contended that the uniform charge given by 1 Vict. c. xcii., is not included both in s. 47 and in s. 49 and abolished by them.

CORROON, L.J.—The question which we have to consider is whether the Great Western Railway Company are still entitled to charge the sum which they were allowed to charge under the Act of 1837 for carrying passengers from Acton to London, and that turns upon the construction of certain sections of the Act of 1847, beginning at the 47th and going down to the 49th.

As I understood the argument addressed to us on behalf of the company, it was contended that the object of those sections was to alter the mileage rate existing under the original Act of the Great

Western Railway Company, and therefore when a charge was made, not under a mileage scale, but under the power of an Act giving the railway company a right to charge a lump sum for passengers carried only a hundred yards on the particular line of railway, that power is not taken away by the section. Undoubtedly the object was to amalgamate the scales, but that might have been done by providing that after the amalgamation the mileage scale of the Great Western should be that which had been the scale of the other railway company with which they were about to be incorporated, or at least of which they were about to take a transfer. But the enactment does not stop there. There is a special provision that after the amalgamation not only shall the mileage scale be the same, but the Great Western Railway Company shall not charge more than a certain sum for the carriage of passengers over their line. That was ambiguous, and the only way in which, as it seems to me, the counsel for the company could get out of s. 49 was by saying that the railway there referred to did not include the bit of railway between Acton and Paddington. In my opinion they cannot so restrict the words of s. 49. The bit of railway between Acton and Paddington had been constituted, as Brett, L.J., has pointed out, under the Act of 1837, giving them power to extend their line of railway, that is, the line of the Great Western Railway Company. The line of the Great Western Railway Company up to that time had been the Great Western Railway and when Parliament gave them power to extend their line without calling it by any particular name, in my opinion it is rightly described as, and must be included within, and becomes part of, "the Great Western Railway;" and consequently, the express provision in s. 49, that the company shall not charge more than the sum therein specified for carriage over the railway, will not allow the special provision of the Act of 1837 to remain in force over what is in my opinion part of the Great Western Railway, which must come within the description in the Act of Parliament of "the said railway," that is "the Great Western Railway," as defined in s. 47. In my opinion the decision of the Queen's Bench Division was right.

The cross-appeal then came on for argument.

The plaintiff in person, in support of the cross-appeal, contended, first, that the defendants were not entitled to charge a passenger by their line with the duty payable by them to the government in respect of his fare, and as to this he cited the Attorney-General v. London and North Western Ry. Co., 5 Ex. D. 247; secondly, that inasmuch as two of the milestones between Bristol and London had not been maintained by the defendants, they could not lawfully demand any fare from him from carrying him as a passenger.

Webster, Q.C., and R. S. Wright, for the defendants, were not called upon to argue.

JESSEL, M.R.—I agree with the decision in the Queen's Bench Division. The 5 & 6 Wm. 4, c. cvii., s. 178, as to the maintenance of milestones applies only to "tolls" properly so-called, and by 9 & 10 Vict. c. cxxi., s. 49, the defendants are clearly empowered to charge for government duty; the words are "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the said railways and of carriages and for locomotive power and for every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums." The words of the statute are decisive.

Brett and Cotton, L.J.J., concurred.

Judgment affirmed.

GALVESTON, HARRISBURG & SAN ANTONIO R. R. Co.

v.

JOHN DONAHOE.

(56 Texas Reports 162. January 30, 1882.)

In an action for damages against a railway company on account of the wrongful arrest of a passenger on its train caused by the conductor, it was alleged that the conductor was "acting within the scope of his authority" *Held*,

It was competent to prove that in the performance of the act the conductor was acting within the sphere of his authority as conferred by the company, or under its instructions.

The principal is not liable in exemplary damages for the unauthorized malicious act of its agent, unless such act is ratified or accepted by the principal.

The citation in a suit against an incorporated railway company described the company as a railroad company. *Held*, that there was no error in overruling a motion to quash the service.

APPEAL from Fort Bend. Tried below before the Hon. Livingstone Lindsay.

Suit by John Donahoe against the appellant to recover \$10,000 damages.

The petition charged in substance as follows: That on the 1st day of April, 1875, Donahoe, at Randon Station in Fort Bend County, on the railway line owned by appellant, went aboard of the west-bound passenger train, with the view of going to Luling, another station on the line. There was no ticket office at Randon Station, and when the conductor came around to collect fare, he ascertained that the fare from Randon to Luling was \$5.70; that he gave the conductor a twenty-dollar United States currency bill; the conductor passed on with the money, and Donahoe sup-

posed that he would return the change as soon as he could get the bill broken; that when the train arrived at Columbus, in Colorado County, an intermediate station, the conductor, without saying anything to Donahoe about the matter, wrongfully and maliciously made an affidavit before a justice of the peace, charging appellee with passing counterfeit money, and wrongfully caused him to be ejected from the cars, and prevented him from continuing on his journey to Luling, to his damage in the sum of \$5,000; that the bill which he gave to the conductor was genuine and not counterfeit, and that the proceeding so instituted against him by the conductor was wrongful, malicious, without probable cause, and that he was then and there wrongfully and illegally arrested at the instance and procurement of the conductor, without probable cause, who procured and caused him to be illegally, wrongfully and maliciously imprisoned in the county jail, where he was detained and kept for six days, and was then discharged for want of prosecution; and that he was thereby further damaged in the sum of \$5,000; that all of the said illegal, wrongful and malicious acts of the conductor were done and performed within the scope of the duties and powers of his agency, and therefore the same were the acts of the appellant. He prayed for a judgment for \$10,000 damages.

The railway company moved to quash the service on account of misnomer; also excepted to the petition on account of a misjoinder of causes of action, and answered by general denial, and specially, amongst other things, that all of the acts of the conductor complained of were outside of his duty as the agent of appellant, and that therefore appellant was not liable as claimed.

The appellant's motion to quash the service, and exceptions, were overruled. Verdict and judgment in favor of appellee for \$4,000.

The errors relied on are these: 1. Overruling the motion to quash service and the demurrer to the petition. 2. The charge of the court. 3. Exclusion of evidence.

John T. Harcourt, for appellant.

P. E. Pearson, for appellee.

WATTS, J. COM. APP.—Upon the trial below the appellant introduced as a witness Hardy Eddins, the superintendent of appellant's railway, and asked him the following questions: "What are the duties and authority of a conductor of a railway train on said railway; and was the instigation of the arrest of a man who was charged with passing counterfeit money within the scope, sphere or range of a conductor, or not?" Appellee objected to the witness answering the questions, and the court sustained the objection. The point was saved by bill, is assigned as error, and relied upon in the brief of counsel.

The duty and authority of a conductor, considered as a matter of law, does not extend beyond that specified in the statute. He

is there recognized as the officer or agent of the corporation in charge of the train, with authority to collect fare from the passengers, and power to put them out of the cars if they refuse to pay. He is made criminally liable for injuries resulting from negligence in the formation of passenger trains under his control.

Outside of these and some other unimportant provisions relating to conductors, his powers, duties and obligations are not defined by law; to the extent mentioned he is liable, and can lawfully exercise the authority conferred; and as between the corporation and strangers, the former cannot, for the purpose of avoiding a liability, qualify or limit the authority thus conferred upon the conductor as its agent, by instructions or otherwise. In these particulars the authority of the conductor to act for the corporation is a matter of law, the extent of which is to be determined by the statute. Beyond this the conductor must be held as the agent of the corporation, with such power and authority as is conferred upon him by the principal, the extent of which is a question of fact to be determined by the evidence.

In the case before us it is distinctly alleged that the conductor was acting within the scope of his authority in making the affidavit, causing appellee to be arrested and wrongfully confined in prison; and for that reason the corporation was liable for the injuries resulting from each and all of these acts of the conductor. As a matter of law, it cannot be said that it was within the scope of the power and duty of the conductor, as agent of the corporation, to institute the prosecution, and to cause appellee to be confined in the county jail. These are questions of fact to be determined by the jury from the evidence.

If, as a matter of fact, the conductor wrongfully expelled the appellee from the cars, or procured it to be done by others, or wrongfully prevented the appellee from going on to the point of destination, or procured it to be done by others, the company, as a matter of law, would be liable to appellee for the actual damages resulting therefrom.

So also, if the corporation had expressly empowered or instructed the conductor to institute legal proceedings against passengers, and cause them to be arrested and confined in prison upon such charges, it would undoubtedly be liable for the acts of the conductor coming within the scope of such authority.

And notwithstanding the general rule that the principal is not liable in exemplary damages for the unauthorized malicious acts of the agent, still, if the principal should ratify or accept such acts of the agent, it thereby becomes liable for the damages, as well exemplary as actual, resulting from the act. As an illustration of this doctrine, if the prosecution instituted against appellee by the conductor was malicious and unfounded, and instituted without the authority of the corporation, still, if it afterwards took up and

carried on that prosecution, this would constitute a ratification of the act of the agent. For upon sound, equitable considerations, the corporation would not be allowed to accept the benefits resulting from the malicious acts of its agent without being compelled to assume the burdens justly attaching to the acts.

Under the issues as presented by the respective pleadings of the parties, the testimony excluded by the court should have been admitted, for it was asserted by the appellee that the acts of the conductor throughout came within the scope of his authority as agent of the company; while it is claimed by the appellant that the conductor was acting throughout beyond and outside of the limits of his agency. The issue thus made was one of fact to be determined by the evidence, and that offered by appellant and excluded by the court was pertinent to the issue.

Besides the court instructed the jury that if they believed from the evidence "that the agents or employees of the company, under the guise of acting in discharge of the duties of their station, did wantonly, and maliciously, and without probable cause, expel the plaintiff from the cars after he had paid his fare in good and lawful money, and had him arrested upon a criminal charge without probable cause, the company would be liable to the plaintiff for such wanton and malicious action of its agents and employees, not only for the actual damages sustained by the plaintiff, but the jury are authorized to give such punitive damages as the jury in their discretion may deem right."

This charge is in direct conflict with the doctrine announced in the case of *Hays v. H., G. N. R. R. Co.*, 46 Tex., 280. It is there held that the principal, whether a natural or artificial person, is not liable in exemplary damages for the unauthorized malicious acts of the agent, unless such acts had been ratified or accepted by the principal.

The error arising from the exclusion of the evidence offered by appellant was intensified by the error contained in the charge.

Appellant's motion to quash the service was properly overruled. The objection was as to the name of the appellant as stated in the citation; the only difference in the name of the corporation as found in the charter, and that used in the citation, consisted in the use of the word "railroad" in the latter, instead of that of "railway" used in the charter. The name of the corporation was sufficiently stated in the citation, and there was no error in overruling the motion to quash the service.

The grounds of the demurrer to the petition were that of misjoinder of causes of action, in this: that a recovery was sought for damages in ejecting the appellee from the cars, also damages for the illegal arrest. It was substantially held in the case of *De Gress v. Hubbard*, decided at the last Austin term (Law Journal, vol. IV. No. 45, p. 717), that the question raised by the demurrer

in this case is one that in a great measure must be left to the sound discretion of the court; and unless the record discloses a palpable abuse of that discretion, the ruling will not be reviewed.

The demurrers were properly overruled. The other errors complained of are such as will not likely occur on another trial.

We conclude that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

See note to *Carter v. L. N. A. & C. R. Co.*, 8 Am. & Eng. R. R. Cas. p. 347.

SLEEPER

v.

PENNSYLVANIA R. R. Co.

(*Advance Case, Pennsylvania. Oct. 2, 1882.*)

Where a person purchases a railroad ticket from a dealer outside the limits of this State who is not an authorized agent of the company, he may maintain an action in the courts of this State against the company for a refusal to carry him on said ticket, notwithstanding the provisions of the Act of May 6, 1863 (P. L. 582), making it unlawful for an unauthorized party to sell railroad tickets in this Commonwealth.

ERROR to the Common Pleas No. 4, of Philadelphia County Case, by George W. Sleeper against the Pennsylvania Railroad Company for ejecting plaintiff from their cars.

At the trial, before Briggs, J., plaintiff testified that on May 8, 1878, he entered a train on defendant's road at Jersey City, bound for Philadelphia, by way of Camden, N. J.; that he tendered to the conductor two tickets purporting to convey him to his destination, which he had purchased from a party in New York City, who sold tickets at reduced rates. The conductor refused to accept the tickets, and ejected him from the cars at Elizabeth, N. J.

Whereupon the court ordered a nonsuit to be entered, on the ground that as the Act of May 6, 1863 (P. L. 582), makes it unlawful for an unauthorized party to sell railroad tickets in this State, a suit should not be maintained here upon a ticket sold in another State, where such sale is lawful.

A motion to take off the nonsuit being overruled, plaintiff took this writ, assigning for error the action of the Court in entering the nonsuit, and afterwards in refusing to take off the same.

J. H. Shoemaker (with whom was George Robinson), for plaintiff in error.

To come within the exception to the universal validity of contracts, a contract must be clearly founded in moral turpitude, and

not simply contrary to the statutes of the country where it is sought to be enforced. Story on Conflict of Laws, sec. 258. A; Kentucky v. Bassford, 6 Hill, 596; McIntyre v. Parks, 3 Mete. 207; Hill v. Spear, 11 Am. Law Reg., N. S. p. 497; Smith v. Godfrey, 28 N. H. 384; Wharton on Conflict of Laws, sec. 485.

The Act of Assembly against the sale of railroad tickets makes it unlawful merely to sell the tickets, and imposes a penalty only on the seller. The purchaser violates no law, and is entitled to relief. Tracy v. Talmage, 14 N. Y. 173.

A railroad ticket is negotiable. 2 Redfield on Railroads, p. 374, n. 4.

Wayne MacVeagh, for defendant in error.

An action founded on a transaction prohibited by a State cannot be maintained, and the principle of public policy is that no Court will lend its aid to a party who grounds his action on an immoral or illegal act. Thorne v. The Travellers' Insurance Co., 30 Sm. 15.

TRUNKY, J.—The parties agree that this case presents a single question, whether a person purchasing a ticket over the Pennsylvania Railroad, from New York to Philadelphia, from a ticket dealer who is not an authorized agent of the company, can maintain an action in the Courts of this State for the refusal of the company to carry him between these points in return for said ticket.

By the Act of May 6, 1863 (P. L. 582), it is made the duty of every railroad company to provide each agent authorized to sell tickets entitling the holder to travel upon its road with a certificate, attested by the corporate seal and the signature of the officer whose name is signed to the tickets. And any person not possessed of such authority, who shall sell, barter, or transfer, for any consideration, the whole or any part of a ticket, or other evidence of the holder's title to travel on any railroad, shall be deemed guilty of a misdemeanor, and shall be liable to be punished by fine and imprisonment. The purchasing and using a ticket from a person who has no authority to sell is not made an offence.

That the plaintiff's ticket, on its face, entitled him to the rights of a passenger between the points named is unquestioned. The only reason for denying him such right was that he bought from one who sold in violation of the statute in Pennsylvania. It is not said that the vendor in New York is actually guilty of the statutory offence, but that the defendant being a corporation in Pennsylvania, and the stipulated right of passage being partly in Pennsylvania, her courts will not enforce a contract resting upon acts which the Legislature has declared criminal.

The presumption is that the ticket was properly issued by the company, and that the holder had the right to use it. Such tickets are evidence of the holder's title to travel on the railroad.

Prior to the statute in Pennsylvania, it was lawful for holders to sell them. The property in them passes by delivery. The Act of 1863 confers no right upon a railroad company to question passengers as to when or where or how they procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company.

At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed, no part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was a mere purchase of the obligation of a common carrier to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the *bona-fide* holder to performance and for breach to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania. It is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, "this action is to enforce, not the contract between the ticket scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error."

The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. But surely it is not an exception to the rule that contracts valid by the law of the place where they are made are generally valid everywhere. Then, as the plaintiff has a valid title to the ticket, the contract between the defendant and himself is valid.

Judgment reversed and procedendo awarded.

See *Commonwealth v. Wilson*, 9 Weekly Notes of Cases (Phila.), 291; *Fry, v. State*, 68 Ind. 552; *People v. Walser*, 11 Chicago Leg. News, 12.

After reversal of the judgment in this case the cause was again tried in the Common Pleas before Arnold J. On the trial the plaintiff was asked on cross-examination where and from whom he bought the ticket in question. He admitted that he had bought it at an office other than the regular office of the company. Verdict was entered for defendant. Plaintiff moved for a new trial, principally on the ground that it was error to admit the above evidence. The court, however, thought the evidence was material as tending to show that the plaintiff knew that the ticket was issued by one not authorized to do so. The motion for a new trial was therefore refused.

WOODRUFF SLEEPING AND PARLOR COACH CO.

v.

DIEHL.

(Advance Case, Indiana. Nov. 21, 1882.)

Sleeping car companies are bound to exercise ordinary care for the security of passengers' valuables.

A passenger in a sleeping car upon retiring for the night placed his vest containing his watch and a considerable sum of money under his pillow. Three other sleeping cars were coupled to the one in question, and during a great part of the night were all under the charge of one conductor. Each car had a porter, who had, however, duties to perform inconsistent with watching over the sleeping passengers. For a part of the night the porter attached to the car in question was absent. When the passenger awoke in the morning he found his vest and the contents thereof gone. In an action by him against the sleeping car company to recover the value of these articles, *held*, that the company had not taken reasonable precautions to guard the plaintiff's property, and that therefore he was entitled to recover.

Semble, that sleeping car companies are not liable either as innkeepers or common carriers for personal goods stolen from the person of an occupant of a berth in a sleeping car.

Howe, J.—In this case the appellee, the plaintiff below, alleged in substance in his complaint, that on the night of the 24th day of July, 1876, the appellant was the owner of a certain car, running upon the line of railroad between the city of Indianapolis, Indiana, and the city of Cleveland, Ohio; which car was used by appellant as a sleeping or lodging car for the lodging of travellers, for a specific reward, to be paid the appellant by such travellers as should use the same, being passengers upon the said railroad; that the appellant, so undertaking to provide lodging for travellers, was bound to keep the goods and chattels brought by such travellers into the said car safely and without diminution or loss; that, upon the day and year last named, being a passenger upon the line of said railroad, the appellee contracted with the appellant for lodging upon its car for the night, and, for two dollars then and there paid to it, was received into the said car and therein was furnished with lodging by the appellant; that the appellee had with him, among other things, goods, chattels, and money, necessary and proper to be carried by him for his comfort, to wit: in currency, the sum of \$111.50, one gold watch of the value of \$172, and one gold chain and locket of the value of \$50; that during the night the appellee so lodged in the place so provided by appellant, and while he so lodged and abided with the appellant as aforesaid the appellant and its servants so carelessly and negligently conducted and behaved themselves, in not keeping proper care and watch, and in not furnishing sleeping

places which could be securely fastened, and in being otherwise careless and negligent, that by and through the said carelessness, negligence, and default of the appellant and its servants, in that behalf, the said goods and chattels and money were wrongfully and unjustly taken and carried away from the appellee by some person or persons to him unknown, and were and since had been wholly lost to him, and all without any fault or negligence whatever on the part of the appellee; wherefore, etc.

The cause was put at issue and tried by the court, at special term; and, at the request of the parties, the court made a special finding of the facts, and thereon stated its conclusions of law, in favor of the appellee. To the third and fourth conclusions of law the appellant severally excepted, for that neither was authorized or warranted by the facts specially found, and neither was the law applicable to the facts so found to be true. The court rendered judgment for the appellee, in accordance with its conclusions of law; and, on appeal, this judgment was in all things affirmed by the court, in general term.

From this judgment of affirmance this appeal is prosecuted; and, by a proper assignment of error here, the appellant has brought the errors, assigned by it in general term, before this court. In general term, the appellant assigned, as errors, the following decisions of the court, at special term:

1. In overruling its demurrer to appellee's complaint.
2. In sustaining a demurrer to the second paragraph of its answer.
3. In the third conclusion of law, upon the facts specially found.
4. In the fourth conclusion of law, upon the special finding of facts.
5. In rendering judgment against the appellant upon the facts found, for that on said facts, and the first and second conclusions of law, the judgment should have been for the appellant; and
6. In overruling the appellant's motion for a new trial.

In the conclusion of their brief of this cause, the learned counsel of the appellant say:

"We submit:

"1. That the demurrer to the complaint in this case should have been sustained;

"2. That, on the facts found by the court, the law is with the appellant; and

"3. That the motion for a new trial on the evidence should have been allowed."

It is not claimed, however, by the appellant's counsel in argument, that the court's special finding of facts is not sustained by sufficient evidence. The facts found by the court are substantially the same as those alleged in the complaint. The important and controlling question for decision in this case is this: Upon the facts found by the court, is the appellant, the sleeping car company,

liable to the appellee in damages for the value of the personal goods lost by or stolen from him while he was an occupant of the berth or place assigned to him by appellant in its sleeping car? This is the only question discussed by counsel on either side; and, therefore, it is the only question we are required to consider and decide. The court's special finding of facts and conclusions of law were, in substance, as follows:

Having been requested by the parties, before entering upon the trial of this cause, to render a special finding of the facts and my conclusions of law thereon, I find the following to be the material

FACTS.

On the 24th day of July, 1876, the defendant was the owner of and engaged in operating a line of coaches, adapted and used for the lodgment of travellers by night over the route of the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, between Indianapolis, Ind., and Cleveland, Ohio. The plaintiff desired to travel to the latter city over said route, holding the pass of the railway company for that purpose. On the evening of the day named he entered the coach of the defendant attached to the rear of the company's train at the depot in Indianapolis, purchased of the defendant's conductor in charge a berth in the coach, and paid therefor two dollars, the sum demanded for the use of the same during the transit from Indianapolis to Cleveland. The coach was divided in the centre lengthwise by an aisle, and on each side was separated into sections, each of which contained two berths, one being the upper and one the lower, and so called. The plaintiff's berth was the upper one on the south side, and in the third section from the rear. The sections were separated at each end by a cloth partition hung by a cord upon a hook and at right angles with the aisle, and facing the latter were curtains, which were divided in the middle and which hung down to the floor from a steel rod placed lengthwise in front of the section. The plaintiff retired for sleep about ten o'clock, when the coach was a number of miles on its way, and placed his money, his watch valued at \$172, and his chain valued at \$50, in his vest. He folded the latter up, placed it under his pillow, and pulled it down so that his shoulder rested upon it, and was speedily asleep. He had \$111.50 in money, of which he placed \$100 in the inside pocket of the vest, and \$11.50 was left in a lower outside pocket therein. The \$100 was in his pocket-book, together with various passes and tickets over divers railroads. He did not offer to deliver this property to the conductor or any other servant of the defendant. He wakened in the morning about six o'clock, not having been awake in the interval, and reached Cleveland by that train at seven A.M. On proceeding to dress he looked for his vest, and discovered that it with the contents was

gone. He at once notified the porter and conductor of the coach of the loss, and while in conversation with the latter the former brought to them the plaintiff's vest, which, on examination, he had found in the upper berth of the section next but one from plaintiff's, and in the rear thereof, and the occupant of which, a passenger on the coach, had left the coach hurriedly at Crestline, a station already passed. Upon examination of the vest the money, watch and chain were missing, and were never recovered by the plaintiff. The partition curtains referred to could be removed readily by the occupant of the adjoining berth by unhooking and dropping them, and afforded no obstruction not easily removed to invasion. The plaintiff had been engaged as a railroad employee and official for fourteen years, was an experienced traveller, and had passed over the line on defendant's coaches numerous times before. Defendant's coaches are all constructed on the same plan; had been in use for years, and plaintiff had rode on Woodruff sleepers before this night over this line a good many times. There were a large number of passengers that night, and the berths were all occupied.

Another of defendant's coaches was being carried immediately in front of the one described, while one or two ordinary passenger cars of the railroad company were still further forward in the train. The custom of defendant was to keep the rear door of her coaches locked, and the forward door unlocked, during transit. The duties of a conductor on her coaches, as prescribed by it, were, to collect the berth fares, locate the passengers, and take entire charge of the coach or coaches; and defendant's porter was required to prepare the berths for sleeping purposes, black the boots of the occupants, look after the toilet arrangements, and generally consult the comfort of the passengers in the coach. He was paid no compensation by the defendant, and his only remuneration was such as he received as gratuities from passengers.

Each sleeping coach was provided with a porter, while but one conductor was supplied for both, and he left the train at Sydney, Ohio, where he went aboard a train going west to Indianapolis.

It was conceded that the conductor discharged his duties while the coach was passing from Indianapolis to Sydney. From Sydney to Gallion, a distance of eighty-four miles, no conductor was supplied, and the coaches were in charge of the porters. At Gallion the cars and coaches from Indianapolis were attached to a train from Cincinnati; and from that station until the arrival at Cleveland the coaches, together with two others on the Cincinnati portion of the train, were in charge of but one conductor.

During this time the porter of the coach in which the plaintiff slept was chiefly engaged in the forward rotunda, a circular apartment at the end of the aisle, in blacking the boots of the passengers, and was absent from the coach during a few moments of the time. The brakeman employed by the railroad company, and who rode on

the rear coach of the train (that occupied by plaintiff), remained thereon during that time, but was in no way employed by defendant.

The porter was competent, having had three years' experience. The conductor and porters of the defendant were forbidden by its rules to receive the money, jewelry, and other valuables of the occupants of a coach, for keeping during the transit. A printed notice was posted in a conspicuous place in each rotunda of the coach in question, to the effect that it would not be responsible for the personal property of the occupants; but this was not brought to the notice of the plaintiff until after his loss was discovered. The defendant had no interest in the carrying of passengers over the route of the railroad company, further than to furnish the sleeping accommodation stated. The plaintiff used due care to protect his property.

Upon the foregoing facts, I state the following to be my conclusions of

LAW.

1. That the defendant is not responsible as a common carrier.
2. That the defendant cannot be held to the liability of an innkeeper.
3. That the plaintiff's loss was occasioned by the negligence of the defendant in failing to keep a sufficient watch during the night, and to take reasonable care to prevent thefts, and that the plaintiff was without fault.
4. That the plaintiff should have judgment for the sum of \$333.50, with interest on said sum at six per cent per annum from the 24th day of July, 1876, making the total sum for which plaintiff should have judgment \$396.

John A. Holman, Judge.

In *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, it was thought not to be necessary, for the purposes of the case, "to determine whether the appellant is to be regarded as a common carrier, or otherwise." It would seem that this question is not presented for decision in the case at bar; for the court at special term expressly decided, in its conclusions of law upon the facts found, that the appellant was not responsible as a common carrier, and that it could not be held to the liability of an innkeeper. These conclusions of law were not excepted to by either party at the special term; nor were they complained of, as errors, in general term. It is clear, therefore, that the first two conclusions of law have not been brought before this court for review; but it may properly be remarked, that it is apparently settled by the decided cases to which our attention has been directed that sleeping-car companies are not liable, either as innkeepers or common carriers, for personal goods stolen from the person of an occupant of a berth in a sleeping car. *Welch v. The Pullman Palace Car Co.*, 17 Abb. (N. S.)

352; *Palmeter v. Wagner* 11 Abb. L. J. 149; *Plum v. Pullman Sleeping Car Co.*, 13 Abb. L. J. 221; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

The third conclusion of law, above quoted, is that the appellee's loss was occasioned by the negligence of the appellant in failing to keep a sufficient watch during the night, and to take reasonable care to prevent thefts, and that the appellee was without fault. This conclusion of law was, we think, fully warranted by the facts found by the court. While it may be true that a sleeping-car company is not liable, either as an innkeeper or a common carrier, yet it cannot be held that the company is not responsible to an occupant of a berth in its car for the loss of his personal goods and money resulting from such negligence as was shown by the facts in this case. The appellant, for a price paid, agreed to furnish the appellee with a berth in its car, in which he might sleep during the night, between Indianapolis and Cleveland, and impliedly agreed to keep watch over him, while asleep, and take reasonable care to prevent the theft of his goods and money from his person, either by unauthorized intruders or by the occupants of the car. The case of an occupant of a berth in a sleeping car is very much like that of an occupant of a state-room on a steamboat. In *Crozier v. The Boston, etc., Steamboat Co.*, 43 How. Pr. 467, the plaintiff, the occupant of a state-room on the defendant's steamboat, retired at night, and in the morning found that his room had been entered, and his watch and chain and pocket-book stolen, and the action was brought to recover the damages sustained thereby. It was said: "In such a case the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practise when awake, and to entrust his person, and whatever men usually carry about their persons to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward, for the comfort thus afforded, will themselves exercise. Certainly, few persons would dare trust themselves to sleep in a state-room on board a steamboat unless they supposed those in charge of it were under an obligation to exercise the utmost vigilance." This language, it seems to us, is as applicable to the occupant of a berth in a sleeping car, as to the occupant of a state-room on a steamboat. In the case cited it was held that the steamboat company was liable to the occupant of the state-room, in the absence of negligence or fraud on his part, for the value of the personal goods stolen from his person while asleep during the night in his state-room.

In the case at bar it was found by the court, as facts, that two sleeping cars in the train were under the charge of one conductor, and that he left the train in the night time; that for the distance of eighty-four miles there was no conductor in charge of the two

cars; and that thereafter, one conductor had charge of four cars. Each car had a porter, but he had duties to perform in the rotunda of the car which were inconsistent with his keeping watch over the sleeping occupants of the car; and for a part of the night the porter attached to the car in which the appellee was sleeping was absent from the car. In *Blum v. Southern Pullman Palace Car Co.*, 3 Cent. L. J. p. 591, it was held that a sleeping-car company was bound, not only to furnish its guest a berth, but to keep a watch during the night to exclude unauthorized persons from the car, and to take reasonable care to prevent thefts. The court also held, that in case of loss occasioned by negligence, in this regard, the company is liable for such articles as a passenger usually carries about his person, and such sum of money as may be reasonably necessary for his travelling expenses. So, in *Palmeter v. Wagner*, supra, the court said: "In the ordinary railway car a passenger may sleep, but it is at his own risk. But when he gets into a sleeping car and pays for sleeping, the passenger is not expected to keep awake to take care of himself and property. . . . Sleeping-car companies undertake to do that which railroad companies find injudicious. This decision is based on the ground that sleeping-car companies are not insurers, but are bound by reasonable watch to protect a passenger in his person and property while asleep."

In 13 Alb. L. J. p. 221, after summing up the adjudged cases on the subject under consideration, the editor says: "The true rule would seem to be, that the sleeping-car company is liable for the want of reasonable care in the protection of the property of its guests." In *Thompson on Carriers of Passengers*, p. 531, after stating that sleeping-car companies are to be regarded neither as innkeepers nor as common carriers, the author proceeds: "What, then, shall be the measure of responsibility of these companies? All the cases seem to agree that their duty is to exercise at least ordinary care for the security of passengers' valuables. Of course this care must be in proportion to the danger reasonably to be apprehended. Such danger is greater at night, while the passenger is asleep, than in the day time, when he is awake and can care for himself. This point is well stated in a case previously noticed. The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is undoubtedly the law, that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say, that a person asleep cannot retain manual possession or

control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants." *Blum v. Southern Pullman Palace Car Co. supra*. Hutchinson on Carriers, § 60, note 2.

In the case at bar the facts were very fully found by the court, and the necessary inference therefrom of the appellant's negligence was so plain and certain that the court was authorized, we think, to state such negligence as a conclusion of law. The Ohio, etc., Railway Co. v. Collarn, 73 Ind. 261. So, also, the facts were so fully found in regard to appellee's acts and conduct as to justify the court in stating, as a conclusion of law, that appellee was without fault.

We find no error in the record which requires the reversal of the judgment below.

The judgment is affirmed, with costs.

The question of the liability of sleeping-car companies for the effects of travellers has been mooted in a few cases, and the law may be construed to have been pretty definitely laid down.

The question first arose in *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. (N. S.) 352, where the plaintiff, upon retiring for the night, placed his overcoat in an upper berth and hung his other clothing on adjoining pegs. During the night it was stolen, when and by whom it did not appear. The plaintiff's contention was that the company defendant was liable as an innkeeper. This the court held was not the case, and the reason of the law applicable to innkeepers was shown not to extend to the case in hand.

More than this, the court held the company defendant not liable as a carrier, inasmuch as the articles in question could not be considered as having been given into the custody of the company as distinguished from that of the passenger (*Tower v. Utica and Schenectady R. R. Co.*, 7 Hill, 47.) "It cannot," said the court, "truthfully be contended that there was any delivery of the coat into the custody of the defendant different from the delivery of it that he would have made to the railroad company had he elected to travel by the ordinary cars. He carried it with him to wear or to put off as the exigencies of his health or the weather required. There was no place to deposit it, and he sought none, nor was it expected that one should be provided. Upon these facts the defendants should not be held liable."

The practical result of this case seems to be that the sleeping-car company would in no case be held liable. The court seems to consider that there is no measure of duty on the company's part. "The fact exists that the most discreet and vigilant officers of a car cannot prevent depredations, and if this duty is imposed by law it is impracticable to meet the responsibility, and the law requires nothing unreasonable or unjust from any member of society."

This case has, however, been much modified by subsequent decisions. In *Blum v. Pullman Car Co.*, 3 Cent. L. J. 591, 13 Alb. L. J. 221, 1 Flippin C. Ct. 500, the court said:

"It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it

himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances in the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants."

Such also is the doctrine of *Palmer v. Wagner*, 11 Alb. L. J. 149, and *Pullman Palace Car Co. v. Smith*, 73 Ill. 860, in both of which it was held that where the company is not bound as an insurer or innkeeper it is obliged to keep reasonable guard over its passengers so as to prevent the stealing of their property.

The company is liable only for such articles as a traveller ought properly to have with him and for such a sum of money as is reasonable to pay traveling expenses. Any larger measure of liability would subject the company to collusive and unjust claims. *Blum v. Pullman Palace Car Co.*, supra; *Pullman Palace Car Co. v. Smith*, supra.

Cf. *Crozier v. Boston, New York, and Newport R. R. Co.*, 43 How Pr. 466.

See report of the principal case in the Indianapolis Superior Court, 10 Cent. L. J. 86.

SUMMITT

v.

THE STATE.

(8 *Lea (Tenn.) Reports*, 418.)

A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable and such as do not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel.

A regulation forbidding hackmen, peddlers, expressmen and loafers from coming within the passenger depot is reasonable.

APPEAL in error from the Criminal Court of Davidson county.
T. W. Wrenne for Summitt.
Attorney-General Lea for the State.

FREEMAN, J.—This is an indictment and conviction for an assault and battery, but presents a question of some interest not ordinarily found in such cases.

The defendant is a watchman with police powers at the Nash-

ville and Chattanooga Railroad Depot in the city of Nashville. That company has a regulation forbidding hackmen, peddlers, expressmen and loafers, from coming within the depot building. Placards are posted in and about the depot announcing this fact. The proof, however, tends to show that a hackman who has a check for luggage of a passenger may enter the building for this purpose, and also that the prosecutor in this case, who was a hackman, had such a check, and exhibited it.

It was the duty of the defendant to see that the regulations of the company referred to were enforced.

The proof tends to show that defendant found prosecutor in the depot, probably at the room provided for passengers, endeavoring to induce a party to take his hack for the Louisville depot. It is claimed by the defendant's witnesses that prosecutor was doing this in a noisy manner. The defendant ordered him out of the depot, and on his refusal to go forcibly ejected him from the building—some proof going to the fact that he struck him a blow with his walking stick. The defendant justifies his conduct by virtue of his authority to enforce the regulation referred to.

On this question his Honor, the criminal judge, charged the jury substantially: That if the prosecutor had a check for the baggage of a passenger then in the depot, and it was one of the rules of the company that the possession of such a check entitled the party as a hackman to go into the depot for the baggage, then he would have the right to go into the depot for that purpose and remain a reasonable time. But that, if from the evidence the prosecutor was in the passenger room and not where the baggage was, whether he was annoying a passenger or not, the defendant had the right, and it was his duty to request him to go out of that particular room, and if prosecutor refused after being so requested, the defendant had the right to use all necessary force to eject him from that room alone, and in this would not be guilty of an assault and battery. But he charged further: "That on this state of facts, defendant would only have the right to put the party out of that room, and should then have permitted him to have gone to the proper place for the baggage; and if, instead of doing this, he ejected him forcibly, not only from the sitting room, but from the depot building, and the prosecutor had lawful business in the depot, then defendant would be liable for this action."

It is settled law, that a railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable, and such as do not unnecessarily infringe upon the rights of the public, and others having or carrying on business in connection with railroad traffic and travel.

We see nothing from the facts found in this case that renders

the regulations of the company under consideration obnoxious to objection. We think, however, his Honor, the criminal judge, gave a correct statement of the law on the facts before him. If it was (as is not seriously controverted) the right of a hackman under the regulations to go into the depot to obtain the luggage of a passenger whose check he has, then it could not be that he had forfeited his right, at the will of the watchman, as a penalty for departing from the strict line of his right by going into the sitting room for passengers. In doing this he was liable to be ordered out of this unauthorized place, and if necessary ejected from it. But it does not follow that in the exercise of this right on the part of the watchman he could go further and deprive the hackman of that which was his right, that is, to procure the luggage for which he had a check. This is not to exercise a right on the part of the watchman, but to go beyond that and enforce a penalty, or forfeiture of another right, because of a violation of the rule of the company by a departure from his proper direction, or going into an unauthorized place temporarily.

All reasonable rules should be enforced and upheld by the law in favor of railroad companies; but at the same time it is equally proper to restrict their agents and officials to the strict line of duty in carrying them out, in order to protect the public from arbitrary conduct on their part in the exercise of their legal rights. The watchman had the right to see that the proper regulation was not violated. When that violation was corrected, then the right of the other party to get the luggage was one of which he could not be deprived under the facts in this case—and such is the theory of his Honor's charge. In this we think he was correct, and affirm the judgment.

The case above reported is decided apparently upon principle rather than upon authority. It will, therefore, be interesting, and we propose to present to our readers a brief statement of the result of the cases upon analogous points. We shall review the general subject of rules and regulations made by railroad companies for their own convenience and for the comfort and safety of their passengers, and consider how far such rules and regulations have and have not been considered valid.

Railroad companies have full authority to make reasonable and suitable regulations for the convenience and safety of themselves and their passengers in and about their stations.

Where, therefore, the entrance of innkeepers or their servants into a railroad depot, to solicit passengers to go to their inns, is an annoyance to the passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, the railroad company may make a regulation prohibiting them from coming into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and after notice to quit the depot fail to do so, the servants of the company may lawfully force them to quit, using of course no more force than is necessary to effect that purpose. *Commonwealth v. Power et al.*, 7 Metc. 596; *Hall v. Power*, 12 Metc. 463.

To a similar effect is *Landrigan v. The State*, 31 Ark. 50.

A railroad company may also prevent all parties, irrespective of their char-

acter, from loitering about a station who have not purchased a ticket, and even the purchase of a ticket does not confer the right to remain at the station except for a reasonable time before the train starts upon which the ticket-holder is to take passage. *Harris v. Stevens et al.*, 31 Vt. 79.

An omnibus proprietor who carries passengers and their luggage for hire, to and from a railroad station, cannot maintain an action against the company for refusing to permit him to drive his vehicle into the station yard. *Barker v. Midland Railway Co.*, 18 C. B. 46.

A common carrier is also warranted in excluding from its conveyances all agents or drummers in the interest of a rival line. Where, therefore, a steamboat company had formed a business arrangement with a line of railroad at its terminus to forward all its passengers by that line, it was held competent for the company to expel from its boats a drummer in the interest of a competition railroad line who was accustomed to solicit passengers, at least if the jury found that the arrangement did not constitute an oppressive monopoly. *Jencks v. Coleman*, 2 Sumner, 221. Upon this point the court said:

"Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which in my judgment completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast or dine or sup at his house, and an agent is employed by a rival house at the distance of a few miles to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not."

Where an innkeeper in a town through which lines of stages pass, and at whose inn the stages stop, permits the drivers of some of the lines to resort to his house without objection, he cannot exclude the driver of a rival line from entering the inn and going into the common public rooms where travellers are usually placed for the purpose of soliciting passengers for his coach, provided there is reasonable expectation that passengers are there, and he comes at a suitable time, conducts himself with propriety, and does no injury to the innkeeper.

If, however, affrays occur through his fault, or he be guilty of any other disturbance by which the guests are annoyed and the innkeeper injured, the latter is justified in excluding him. *Markham v. Brown*, 8 N. H. 523.

A carrier may himself establish an agency for the delivery of passengers' baggage, and may exclude an agent of a competing delivery company from its conveyances. *Barney v. Oyster Bay & Huntingdon S. Co.*, 67 N. Y. 301; *The D. R. Martin*, 11 Blatch. C. C. 233.

A carrier may and ought to exclude and eject from his conveyances all persons guilty of brawling and riotous conduct, obscene or indecent language, or drunkenness of so gross a character as to be offensive to the other passengers. *Pittsburg & C. R. Co. v. Pillow* 76 Pa. St. 510; *Railroad Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Norwich & N. Y. Trans. Co.*, 34 Com. 554; *Hinton v. Middlesex R. Co.*, 11 Allen, 304; *Putnam v. Broadway & 7th Ave. R. Co.*, 55 N. Y. 109; *Murphy v. Union R. Co.* 118 Mass. 223.

Slight intoxication, if not of a gross or offensive character, will not warrant such ejection. *Pittsburg C. & St. L. R. Co. v. Bolner*, 57 Ind. 572.

Gamblers and monte men getting upon a train to ply their vocation may be excluded.

"The railroad company is bound as a common carrier when not overcrowded to take all proper persons who may apply for transportation over its line on their complying with all reasonable rules of the company. But it is not bound to carry a person at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible object might be to injure the line, one fleeing from justice, one

going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form or committing any crime; nor is it bound to carry persons infected with contagious diseases to the danger of other passengers. The person must be upon lawful and legitimate business. As gambling is a crime under the state laws it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying on an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling and refusing to desist they may be forcibly expelled." *Thurston v. Union Pacific R. Co.*, 4 Dill. 321.

The reservation of a car for ladies and for gentlemen accompanied by ladies is valid and may be enforced. *Chicago etc., R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago, etc., R. Co.*, 86 Wisc. 450; *S. C. 39 Wisc. 636*; *S. C. 42 Wisc. 654*; *Peck v. New York, etc., R. Co.*, 70 N. Y. 587; *State v. Overton*, 24 N. J. L. 435; *Pittsburg, etc., R. Co. v. Hinds*, 53 Pa. St. 572; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa, 314.

A railroad company may rightfully exclude from the ladies' car a passenger whose reputation as a prostitute is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive or whose demeanor at the time is annoying to other passengers. She cannot, however, be excluded for unchastity not affecting her conduct or furnishing reasonable grounds to believe that she will misbehave in the car, when her conduct at the time was lady-like and unexceptionable. *Brown v. Memphis & Charleston R. Co.*, 1 Am. & Eng. R. R. Cas. 247.

A common carrier may refuse to receive as a passenger a person accused of crime by a vigilance committee if in his judgment trouble will ensue in consequence. But if he has once received such a passenger he is not justified in ejecting him and returning him to the place from which he has been transported. *Pearson v. Duane*, 4 Wall. 605.

As to the question of the right of a railroad company to make regulations discriminating between colored and white passengers, much litigation has taken place. Irrespective of statute law it seems to be settled that such regulations in order to be valid must be reasonable, and depend on some more substantial ground than mere prejudice of race. A railroad company cannot, for example, justify the exclusion of a woman from the ladies' car solely because she was a person of color. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185.

In Michigan it has been held prior to the war that a regulation prohibiting negroes from enjoying the benefits of a cabin passage on board a steamer was reasonable. *Day v. Owen*, 5 Mich. 520.

In Pennsylvania a regulation confining negroes to the front platform of street cars has been deemed reasonable and valid. *Gaines v. McCandless*, 4 Phila. 255.

So also a regulation requiring negroes to sit at one end of a passenger car. *Westchester, etc., R. Co. v. Mills*, 55 Pa. St. 209.

The statute of Louisiana prohibiting discrimination of race in the case of common carriers has been held by the supreme court of the United States unconstitutional as a regulation of inter-state commerce, although in the case in hand the passenger in question was travelling upon the waters of the Mississippi River from one port to another in the state of Louisiana. *Hall v. DeCuir*, 95 U. S. 485.

Since the passage of the Civil Rights Bill of March 1, 1875, there has been much question as to the exact effect of it in the case of the carriers of passengers.

Some authorities construe this act as requiring the carrier to afford equal accommodations to the black race and the white in point of comfort and

convenience, but not to require him to allow them both to ride in the same conveyance if they be so minded. According to this view, a carrier is warranted in providing different cabins or cars and in establishing regulations by which one set of accommodations is afforded to the white and one to the negro race. *Green v. City of Bridgeton*, 9 Cent. L. J. 206; *The Civil Rights Bill*, 1 Hughes, 541. Dick, J., in the latter case, says:

"There is no principle of law, human or divine, that requires all men to be thrown into social hotch-pot in order that their equality of civil rights may be secured and enforced. The civil rights bill neither imposes nor was intended to impose any such social obligation. It only proposes to provide for the enforcement of legal rights guaranteed to all citizens by the law of the land, and leaves social rights and privileges to be regulated, as they have ever been, by the customs and usages of society."

There are, however, other authorities which hold the contrary. *Railroad Co. v. Brown*, 17 Wall, 445; *Coger v. North Western Union P. Co.*, 37 Iowa, 145.

In the latter case the plaintiff, who was a passenger on the boat of the company, defendant, was prevented from taking her meals in the cabin with the other passengers, and was ordered to eat in the pantry or on the guards. She sued the company under the provisions of the civil rights bill and recovered damages. It is clear, however, that the accommodations afforded her were not equal to those enjoyed by white passengers, so that the case has no great weight. *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146.

In Pennsylvania railroad corporations are now especially prohibited by statute from making any classification of their passengers according to color or race, and any person aggrieved by a violation of this act may recover a penalty of \$500. *Central R. of New Jersey v. Green*, 86 Pa. St. 421.

G. B. BEAUCHAMP

v.

INTERNATIONAL and GREAT NORTHERN R. R. Co.

(56 *Texas Reports*, 289. *February* 18, 1882.)

The time-table of a railway company, which on its face announces that it is for the government and information of employees only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping the train at a place mentioned in the time-table, but at which no station was ever really established.

The supreme court will not grant a new trial on the ground of surprise when it was the result of misapprehension by the counsel of the law of the case.

It is the duty of a person about to take passage on a railway train to inform himself when, where and how he can go and stop, according to the regulations of the railway company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences.

By his ticket the passenger on a railway train acquires the right only to be carried according to the custom of the road. He has the right to go to the

place which his ticket calls for on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road.

ERROR from Harris. Tried below before the Hon. James Masterson.

This was a suit brought by the appellant, G. B. Beauchamp, against the International and Great Northern Railroad Co. for damages, based upon the failure of the defendant to stop the mixed train upon which he was a passenger at a point on said road called "Cross Timbers," between Waverly and Houston, and within five miles of Houston, the plaintiff being a passenger on said train and having purchased his ticket at Waverly, and which called for Houston as his destination. The appellant, after having embarked on the train, requested the conductor to put him off at "Cross Timbers," but the conductor informed him that he could not comply with that request because he was behind time, in consequence whereof he was brought to Houston on the train and walked back home near "Cross Timbers," the same night after reaching Houston."

The defendant filed a general denial.

The plaintiff as a witness testified that on the 11th of October, 1875, at Waverly, he purchased the ticket above referred to, and started on a freight train, shortly afterwards taking the accommodation train which ran from Willis to Houston. That he requested Sullivan, the conductor, to put him off at "Cross Timbers," with the result which has been stated; and who further stated that the train did not stop at "Cross Timbers," and that he could not stop the train to put him off. Witness said that he took the accommodation train because he thought it would stop at that point and he could get off and reach his home, which was near there; that it is usual and customary for accommodation trains to stop at all way stations and switches. Witness stated on cross-examination that the railway company did no business at "Cross Timbers," has no agent at that point, nor platform, nor station-house, nor house of any kind,—has nothing there but a switch. The defendant once had a wood-yard there, but there was no wood-yard at that point on the 11th of October, 1875. Never of his own knowledge knew of any person getting on or off at that place except Mr. Tally and his family, who, with their baggage, occupied a whole box car, and who were moving into that neighborhood at that time.

The testimony of the defence, given through officers of the road then in its employment, strongly negatived the suggestion of "Cross Timbers" being a point at which any of its trains stopped under any regulation to that effect established by the company, and that in fact its trains were not in the habit of stopping there, except when it was necessary for trains to pass each other.

On the trial the plaintiff offered in evidence Time Schedule No. 21, which was attached to the record in this case as an exhibit, and is sufficiently described in the opinion. The bill of exceptions shows that it was offered to prove that the station "Cross Timbers" was by the company in said-time schedule written down and treated as a station, and that the accommodation trains were ordered to stop there, all of which he offered to show "by the same;" and this evidence the court excluded on the ground that, it being "for the government and information of employees only," it was not competent evidence in plaintiff's behalf, while it might be for employees. To this ruling the plaintiff excepted, claiming that the schedule admits a fact which it is competent to prove, regardless of the manner of its admission, to whom made, or for what purpose; and the schedule was offered by plaintiff to contradict the evidence of defendant's witnesses, who testified that they had no instructions to regard this as a station, or to stop at it, and that they were not in possession of information from the company to so regard or treat it. To its introduction for this purpose it was also excluded, to which plaintiff excepted. Verdict and judgment for the defendant.

The plaintiff assigned the following as grounds of error:

"1. The court erred in refusing to allow plaintiff to introduce in evidence 'Time Schedule No. 21' of the International and G. N. R. Co., as her plaintiff's bill of exceptions.

"2. The court erred in its charge to the jury in two respects: 1st. In making prominent the impression on the mind of the court that 'Cross Timbers' was not a regular stopping place, and thereby influencing the jury to take that view from the court. 2d. In charging that if 'Cross Timbers' is a siding where sometimes the passenger or accommodation trains stopped and sometimes did not, then find for defendant; thereby presenting an issue as to the habit and not the duty of the company.

"3. The court erred in not granting us a new trial (after ruling out our evidence upon which we had relied to establish our case) when we presented the affidavit of witnesses, Tally, Westcott and Koenig."

Hutcheson & Carrington, for plaintiff in error.

Baker & Botts, for defendant in error.

WALKER, P. J. Com. App.—Whether the court erred or not in the exclusion of the time-table offered in evidence, as an abstract legal question under the rules of pleading and evidence, will not necessarily determine the reversal or the affirmance of the judgment. If the evidence offered, being admitted, could not properly have influenced the jury to a result different from that at which they arrived from the consideration of the other evidence in the case, then, in such case, if it were improperly excluded, the error

would have been an abstract error, which would not work a reversal of the judgment. Neither the admission nor exclusion of testimony, where it does not appear that the error affected the result or prejudiced the appellant, will be cause for reversal. *Willis v. Chambers*, 8 Tex. 150; *Atkinson v. Wilson*, 31 Tex. 643; *Morrison v. Laffin*, 44 Tex. 17; *Nicholson v. Horton*, 23 Tex. 47.

The materiality of the testimony excluded was for the sole purpose of establishing the fact, so far as it might, that "Cross Timbers" was in fact a station at which accommodation trains were accustomed to stop for the convenience of passengers on said railway.

It is plain from the evidence (nor is the proposition controverted) that in truth "Cross Timbers" was not a station on said railway. There was no station-house or station-keeper, nor other incidents pertaining to a railway station. It was a mere siding at which trains might pass each other for the convenience of the railway company.

The instrument referred to as the "time-table" offered in evidence was a printed document purporting to be issued by the general superintendent of the International and Great Northern Ry. Co., on the title page whereof was indorsed as follows: "Time schedule No. 21, to take effect Sunday, October 3, 1875, for the government and information of the employees only. The company reserve the right to vary therefrom at pleasure." This printed document contained a ruled list (tabular) showing the times of arrival and departure of freight, St. Louis express and mixed trains at the stations specified. This schedule indicated that the mixed train bound north was due at "Cross Timbers" at eight o'clock and five minutes A. M., and that the same bound south was due at that place at eight and twenty-seven minutes P. M., and that none of the other trains, according to said time-table, stopped there at all. As it was not pretended at the trial by the appellant that there existed other evidence to vary or change the effect of the "time-table," or in any respect to qualify that which it purported to be on its face, in reviewing the action of the court and jury in rendering verdict and judgment it is not possible to perceive that, had the rejected evidence been allowed, a different result could properly have ensued. As has been made to appear, this time-table was an internal regulation intended for the regulation of the employees of the road; it was subject to change at its pleasure; and if the same had in fact never been practically enforced or put in operation by the superintendent of the road, neither third persons nor the public at large would have been entitled to reverse his determination by practically giving effect to it in the shape or by way of actions in damages for the non-fulfilment of the terms prescribed by such time-table.

The gist of the plaintiff's cause of action consists in the promise,

expressed or implied, on the part of the railway company, to stop his train, provided the same were a mixed train, at "Cross Timbers," when requested to do so by the plaintiff; and the damage resulting in failure to perform that obligation he claims as the legal result of the breach of that promise. The evidence wholly fails to show such expressed promise, nor does the law imply such unless "Cross Timbers" was that which in fact it was not—a station.

The appellant virtually recognizes the correctness of this proposition and seeks to avoid its force by the implied obligation or undertaking to stop the train on which he had taken passage at "Cross Timbers," by reason of the recitals contained in the time-table referred to. If by private contract to that effect, or by publication of notices, time-tables, or other documents fairly and reasonably inducing a passenger to act thereupon in the purchase of his ticket, or the payment of his fare along the line of road, which would include such intermediate station, it would seem that a breach of the company's duty under such circumstances to stop its train at such place at the request of the passenger, would afford a just ground of action. But as applied to this case such facts are merely hypothetical. The time-table, as has been already stated, absolutely, pointedly, and apparently with emphasis, took pains to notify the public that the time-table thus published by them "was for the government and information of employees only," and that "the company reserved the right to vary therefrom at pleasure."

The testimony contained in the statement of facts did not show with definiteness what action had been taken under the new time-table by the company. The time-table on its face purported to take effect on the 3d of October, 1875. The cause of the alleged complaint transpired on the 11th of October of the same year; and whether the company at said last-named date had put into effect the regulation to stop at "Cross Timbers" or not, or whether, in the exercise of its reserved right to vary the programme as published, it had on the 11th of the month, so varied the same as not to require the stopping of mixed trains at "Cross Timbers," does not appear.

The plaintiff being the actor, the burden devolved upon him to make out a case of liability arising from contract express or implied; and the evidence, in connection with that which was excluded, does not impose, according to any proper interpretation which can be placed upon it, a legal duty, the violation of which can be punished with damages, to stop the defendant's train at "Cross Timbers" at defendant's request.

The time-table, had it been admitted, did not serve the purpose to establish an implied promise on the part of the company to stop the train that it otherwise would have been obliged to do under the general law, which required trains to stop at stations only. No additional force or advantage could have been gained, so far as we

can perceive, to the plaintiff by the admission of the evidence which was excluded, especially in view of the limitations and conditions annexed to it, and to which reference has been sufficiently made.

It was urged on the trial below that the evidence referred to was admissible as an admission by the defendant of the fact that the regulation requiring trains to stop at "Cross Timbers" was an admission for the interest of whom it might concern of the fact that trains did and would stop at "Cross Timbers," notwithstanding the fact that it was issued "for the government and information of employees only."

We do not conceive this ground to be tenable. Under the restrictions and limitations annexed to the instrument, it does not tend to prove an engagement by the defendant, and a corresponding obligation to the public, to run its trains any longer under the said schedule than it sees proper to do, nor that in point of fact does it tend to show that the defendant, at the time the plaintiff purchased his ticket, had put in operation and was enforcing the regulation in said time-table, which contemplated the stopping of mixed trains at "Cross Timbers."

As an admission of the fact that the defendant was at the time in question running its mixed trains to "Cross Timbers" on schedule time, and stopping there as at stations, the testimony offered will not be allowed as evidence of such fact, nor as tending to establish it, because the facts which were essential to constitute it such were contingent and conditional, and such evidence would have been remote. If it had been admitted, it cannot be supposed that, when it was considered with all the other evidence in the case, the jury could have drawn an inference from it inconsistent with the evidence upon which they acted. The document offered was not, indeed, one which purported to admit that the company had proposed by it to run any of its trains so as to stop at "Cross Timbers;" it was at most but directions given by the superintendent to control the employees and operatives who were engaged in managing the machinery of the rolling stock of all grades and classes on the road, and those directions were subject to change and variation at pleasure. We think, therefore, that the ground urged by the appellant for the admission of the evidence is not maintainable.

The third ground assigned as error is as follows: "The court erred in not granting us a new trial (after ruling out our evidence upon which we had relied to establish our case) when we presented the affidavits of witnesses Tally, Westcott and Koenig." The ground relied upon is in effect surprise on account of the ruling of the court upon a question of law. *Held*, that the supreme court will not grant a new trial on the ground of surprise, where it was the result of a misapprehension by the counsel of the law of the case. *Phillips v. Wheeler*, 10 Tex. 536.

Nevertheless in all cases of this kind the court may, in the exercise of a proper, sound legal discretion, grant a new trial where the ends of justice seem to demand it; and so it has been held that where a party shows reasonable care and diligence to provide himself with testimony to make out his case, and uses the ordinary caution of a prudent attorney in informing himself of the facts to which the witnesses will depose, and is then disappointed with the testimony of his witnesses, so that an injury will result, which may be remedied by another trial, a new trial will be granted. *Delmas v. Margow*, 25 Tex. 1.

And again, it is laid down that where it is evident, from all the facts attending the case, that by a ruling of the court in the progress of the trial a party was cut off from trying his cause on the merits, or deprived of any other right, though in strictness the ruling may have been correct, yet it is made to appear that the default of the party was not inexcusable, and he presents a *prima facie* case of merits, he ought to be allowed a new trial. *Chambers v. Fisk*, 15 Tex. 335.

This application for a new trial is not brought sufficiently within these rules to entitle the plaintiff to a new trial. In the first place, the reliance alleged in the motion to have been exclusively placed on the evidence which was excluded in order to support the plaintiff's cause of action, was not made to appear by the party seeking the new trial, or by his counsel, in any mode which the court could recognize as a sufficient showing of that fact. The court could take no judicial notice of the existence of those matters which the motion indicates had dictated the preparation, management and direction of the trial in behalf of the plaintiff. It should have been sworn to. The facts stated in the exhibits attached to the motion (affidavits of Westcott and others) are quite inconclusive to show a state of case which would probably alter or change the result on another trial. Their statements were vague and indefinite as to the time when the facts and incidents related by them transpired, or from which it might be deduced that "Cross Timbers" was at the time inquired of in this suit a station in fact on said railroad.

The circumstances detailed did not exclude a reasonable inference that the stopping referred to, by some at least of the affiants, had been induced by special request, as by signaling and otherwise, rather than as the result of an established and regular custom of the trains of the defendant to treat the point in question as a regular stopping point at which passengers had a right to embark and debark.

We conclude that this ground of error is not well taken. We agree that the remarks in appellant's brief, "that if the court did not err in excluding evidence, the charges, though erroneous, such error would be merely abstract." We do not deem it necessary,

therefore, to consider the assignment of error which relates to the charge of the court.

Upon the merits of the case, under the facts disclosed in evidence, we conclude that the verdict and judgment was correct and is well supported by authority. It is laid down as incontrovertible law, that "it is the duty of a person about to take passage on a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the railroad company; and if he makes a mistake not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences." *Ohio & Miss. Ry. Co. v. Applewhite*, 52 Ind. 540; *Pittsburg, Cin. and St. L. Ry. Co. v. Nuzum*, 50 Ind. 141; *Cheney v. The Boston & M. R. R. Co.*, 11 Met. 121; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen, 267; *Johnson v. The Concord R. R. Co.*, 46 N. H. 213; *Cleveland & C. R. R. Co. v. Bartram*, 11 Ohio St. 457; *Dietrich v. Penn. R. R. Co.*, 71 Pa. St. 436; *Chicago & C. R. R. Co. v. Randolph*, 53 Ill. 510; and see *O. & M. R. Ry. Co. v. Applewhite*, 52 Ind. 540; 50 Ind. 141. "By his ticket a passenger acquires only the right to be carried according to the custom of the road; he has the right to go to the place which his ticket calls on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road." *Chicago & Alton Ry. Co. v. Randolph*, 53 Ill. 511. In this case the plaintiff purchased his ticket to Houston without further inquiry as to the regulation then existing to stop at "Cross Timbers" than he may have ascertained or supposed to have been in force from seeing a time-table, published, as has been seen, for the "government and information" of its "employees only." The plaintiff has failed to show that at that time the company was obliged, upon any principle of law applicable to this subject, to stop its train for his convenience at any other point than at some station between Waverly and Houston. The evidence failed to show that "Cross Timbers" was at that time such station, or that the company were then running mixed trains under a regulation given out to the public either expressly or from circumstances from which the public might conclude that mixed trains regularly stopped at "Cross Timbers" for the convenience of passengers.

We therefore conclude upon the whole case that the judgment ought to be affirmed.

Affirmed.

The principal case involves the important question as to the obligations of railroad companies to run their trains so as to arrive and depart on schedule time, and to stop at way stations, in accordance with the published time-tables to take on or let off passengers. We propose to present to our readers a brief review of the decisions on these points.

The leading case is *Denton v. Gt. Northern Railroad Co.*, 5 Ell. & Bl. 860,

decided by Lord Campbell. It is there laid down as law that where a railroad company advertises its time-tables, whereby it undertakes to transport passengers between two given points within certain hours of each day, and fails to run trains corresponding to its advertisement, it must pay to a person, who, on the faith thereof, has come to the station to be transported, the damage he sustains by reason of the delay.

"It seems to me," said Campbell, C.J., "that representations made by railroad companies in their time-tables cannot be treated as waste paper, and in the present case I think the plaintiff is entitled to recover, on the ground that there was a contract with him, and also on the ground that there was a false representation by the company." See to the same effect *Hawcroft v. Great Northern R. R. Co.*, 16 Jur. 196; *Howard v. Cobb*, 19 Law Rep. 377.

The train must also travel on schedule time. If it fails to do so, and there be undue delay, a passenger may recover damages. *Van Buskirk v. Roberts*, 31 N. Y. 661; *Ward v. Vanderbilt*, 4 Abb., N. Y. Ct. of App. 521.

Where a train is advertised to stop at a particular station, and it fails to do so, whereby a person who has come to the station to take passage is prevented from so doing, he may recover damages. *Indianapolis, B. & W. R. Co. v. Booney*, 71 Ill. 391; *Hein v. M'Caughan et ux.*, 32 Miss. 17.

And where a passenger on the train is carried past the station for which he holds a ticket, he is ordinarily entitled to damages. *New Orleans, J. & Gt. N. R. R. Co. v. Hurst*, 36 Miss. 660; *Mobile & Ohio R. R. Co. v. McArthur*, 43 Miss. 180; *Southern R. R. Co. v. Hendricks et ux.*, 40 Miss. 375; *New Orleans, J. & Gt. N. R. R. Co. v. Statham*, 42 Miss. 607; *Thompson v. New Orleans, J. & Gt. N. R. R. Co.*, 50 Miss. 315; *Hobbs v. London & S. W. R. R. Co.*, L. R., 10 Q. B. 111; *Chicago, St. L. & N. O. R. R. Co. v. Scurr*, 6 Am. & Eng. R. R. Cas. 341.

He must, however, aver in his complaint either that the train upon which he has taken passage usually stops at the station in question under the rules of the company, or else he must aver a special contract with him to stop at such station. *Ohio & Miss. R. R. Co. v. Hatton*, 16 Ind. 12.

If either of these allegations be true the company has no excuse for its failure to stop. *Porter v. The New England*, 17 Mo. 290.

It is the duty of a passenger intending to take passage on a train to find out before starting whether such train stops at the station for which he holds a ticket. If he fails to take this precaution, and gets upon an express train which does not stop at such station, he is not entitled to recover damages. *Ohio & Miss. R. R. Co. v. Applewhite*, 52 Ind. 540; *Pittsburg, Cin. & St. Louis R. R. Co. v. Nuzum*, 50 Ind. 141; *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510; *Lake Shore & Mich. S. R. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340.

He should, of course, consult the published time-tables, but may rely upon the representations of the agent from whom he buys his ticket. *Pittsburg, Cin. & St. L. R. R. Co. v. Nuzum*, 50 Ind. 141.

Unless, indeed, he is subsequently afforded such means of information as a reasonable and prudent man would not neglect. *Lake Shore & Mich. S. R. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Barker v. New York Central R. R. Co.* 24 N. Y. 599; *Page v. New York Central R. R. Co.*, 6 Duer, 523.

Where a passenger has been misinformed by the ticket agent as to the stoppage of a certain train, the conductor is not bound upon being informed of that fact to stop the train in violation of established rules. *Lake Shore & Mich. S. R. R. Co. v. Pierce*, 3 Am. & Eng. Cas. 340.

The conductor of an express train may lawfully stop the train and expel a passenger who holds a ticket to a station between the place where fare is demanded and the first station at which the train, by the published time-tables is to stop, if such passenger refuse to pay the fare which, in addition

to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so notwithstanding the train may occasionally stop at the station for which the passenger has a ticket, if at the time the fare is demanded, facts do not exist calling for its stoppage there. *Fink v. Albany & Susq. R. R. Co.*, 4 Lans. 147.

In such case the passenger ejected has no right to recover damages, even though he may have been misinformed by the ticket agent as to the stoppage of the train. *Lake Shore & Mich. S. R. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340.

The mere taking up of a ticket for a way station by the conductor on an express train does not constitute an agreement on his part to stop at the way station. *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510.

At least where the ticket contains on its face the words, "Good only on trains stopping at station named." *Ohio & Miss. R. R. Co. v. Hatton*, 60 Ind. 12.

It seems that the conductor lacks the power to bind the company by such an agreement. *Ibid.*

Where one travelling on a passenger train of a railroad company presents to the conductor a ticket issued by the said company, authorizing him to ride from one designated station to another, "only on such trains as stop regularly at stations," and is ejected from the cars by the conductor between such stations, it is no defence to his action for damages that by the regulations of the company the train on which he is travelling does not stop at the latter station, where said station is a town of such a size as is designated by law at which all trains must stop. *Pennsylvania Co. v. Wentz*, 37 Ohio St. 383; 3 Am. & Eng. R. R. Cas. 478.

The principles above laid down with reference to cases where there is a failure to stop at a station are equally applicable where a train diverges from the route which a passenger intends to pursue. *Barker v. New York Central R. R. Co.*, 24 N. Y. 599; *Page v. New York Central R. R. Co.*, 6 Duer, 523; *Hobbs v. London & S. W. R. R. Co.*, L. R., 10 Q. B. 111.

In the first-named case, the plaintiff got into a train which he was informed went to Lyons. After proceeding in the proper direction about 250 miles, the train diverged from the line to Lyons, and went in another direction. Plaintiff was informed of his error, and was told to leave the train, being tendered a free pass back to the junction from which he might resume his journey. He refused the pass, and was expelled from the cars. In a suit brought by him against the company it was held that notwithstanding the original misinformation, if, before arriving at the junction, reasonable means were taken to draw his attention to the necessity of changing cars, the company was not liable.

The actions of which we have been speaking above are sound in tort. *Hein v. McCaughan, et ux.*, 82 Miss. 17; *New Orleans, J. & Gt. N. R. R. Co. v. Hurst*, 86 Miss. 660.

Important questions often arise in such cases as to what is the proper measure of damages. It has been held that a proper and reasonable compensation for the time lost by the plaintiff should always be allowed, even though no specific evidence of the value of the time be adduced. *Ward v. Vanderbilt*, 4 Abb., N. Y. Ct. of App., Dec. 521.

It may be doubted whether this is sound law. The current of authority is that in ordinary cases the plaintiff is entitled only to the actual damage proved. *Fink v. Albany & Susq. R. R. Co.*, 4 Lans. 147; *Indianapolis, R. & W. R. R. Co. v. Birney*, 71 Ill. 391; *Thompson v. New Orleans, J. & Gt. N. R. R. Co.*, 50 Miss. 315; *Southern R. R. Co. v. Hendricks et al.*, 40 Miss. 375.

In the latter case the plaintiff, who was a woman, was carried past her station, and, upon getting out, was obliged to walk back in the dark some

distance, over bridges, etc., to her great terror, as the declaration averred. She could not, however, prove actual injury, and was allowed to recover, therefore, nominal damages only. Where, of course, undue force is used to expel the passenger, he may recover punitive or exemplary damages. *New Orleans, J. & Gt. N. R. R. Co. v. Hurst*, 36 Miss. 660. But not otherwise.

In *Chicago, St. Louis & N. O. R. R. Co. v. Scurr*, 6 Am. & Eng. R. R. Cas. 341, the facts were these: Plaintiff took passage at night on a train from Grenada to Torrence. The train passed the latter point without stopping. At the next station the conductor gave to plaintiff an order, entitling him to be carried back to Torrence, free of charge, by a freight train, which would pass in a few hours. The conductor behaved throughout politely. Plaintiff took the order, but failed to avail himself of it. *Held*, that the case was plainly one in which exemplary damages were not allowable.

If, at the time of the occurrence, plaintiff was sick, and in consequence of the exposure was made worse, the jury may take this into account. *Hein v. McCaughan, et ux.*, 32 Miss. 17; *New Orleans, J. & Gt. N. R. R. Co. v. Statham*, 42 Miss. 607; *Mobile & Ohio R. R. Co. v. McArthur*, 48 Miss. 180.

In *Hobbs v. London & S. W. R. R. Co.*, L. R., 10 Q. B. 111, the plaintiff and his wife took a train from London at midnight, which they were told went to Hampton Court, where they lived. The train landed plaintiff and his wife about one in the morning at a station nearly six miles from their destination. They could find no public-house open, and were forced to walk home, in consequence of which the wife fell sick. It was held that damages could be recovered for the long walk plaintiff was compelled to take, but that the damages arising from the wife's sickness were too remote, and were not recoverable.

In *Indianapolis, B. & W. R. R. Co. v. Birney*, 71 Ill. 391, the plaintiff went to a way-station to take passage. The train advertised to stop at that station failed to do so, whereupon plaintiff walked to the point of destination. This walk brought about an illness. It was held, however, that he was not entitled to damages therefor, the court intimating that he ought to have procured a conveyance, and might have recovered the expense from the railroad company.

BUFFALO, PITTSBURG AND WESTERN R. R. CO.

v.

HUGH O'HARA AND WIFE.

SAME v. HUGH O'HARA.

(*Advances Case, Pennsylvania. December 30, 1882.*)

A free pass, containing an express release of the liability of a railroad company for all damages on account of injury to the person of the holder, although accepted and used, does not relieve the company from liability as a common carrier for negligence.

One who accepts and uses a free pass issued by a railroad company, in violation of the Constitution of 1873 and the Act of June 15, 1874 (P. L. 289), does not thereby become a trespasser.

ERROR to the Common Pleas of Forest County.

Case by Hugh O'Hara and Ellen his wife, in right of said wife,

against the Buffalo, Pittsburg and Western Railroad Company, to recover damages for injuries to the plaintiff Ellen, resulting from a railroad accident alleged to have been caused by defendant's negligence.

Case by Hugh O'Hara against the same company to recover for the loss of his wife's services, caused by the same accident.

On the trial, before Brown, P. J., the following facts appeared: The defendant is a railroad corporation, operating a road from Oil City, Venango County, to Irvinetown, Warren County. The corporation was chartered in 1876, and subject, therefore, to the Constitution of 1873 and the Act of 1874, forbidding the granting of free passes.

On February 22, 1881, Mrs. O'Hara, one of the plaintiffs, being the wife of Hugh O'Hara, an employee of the defendant, was riding in a regular mail train of the company from Oil City to Trunkeyville, upon a pass in the following form:

PITTSBURG, TITUSVILLE & BUFFALO RAILWAY.

TRIP PASS.

Pass Mrs. Hugh O'Hara on account of _____, from Oil City to Trunkeyville, when countersigned by T. F. Hilliard.

Conditioned that the person accepting this free pass assumes all risk of accident to his person or property without claims for damages on this corporation. Good only for the person named.

[4054]

T. H. WILSON, Superintendent

COUNTER SIGNATURE OF T. F. HILLIARD.

Mrs. O'Hara occupied a seat near the front of the rear car, and as the regular train was moving slowly from President Station, a locomotive, drawing a special train, which was following at a short interval, ran into the car into which Mrs. O'Hara was sitting. The plaintiffs brought these suits to recover damages resulting from injuries to Mrs. O'Hara, occasioned by the collision.

Plaintiffs asked the court to charge—

(2.) "The release of damages contained in the pass given in evidence will not relieve the defendant company from liability for damages occasioned by the negligence of the company or its agents." Affirmed.

Defendant asked the court to charge—

(As to the suit in right of Mrs. O'Hara.)

(1.) "It being the uncontroverted evidence that Mrs. O'Hara was not an employee of the defendant, and that she was travelling upon defendant's railroad upon a free pass, for which she had given no consideration; such pass having been issued in violation of law, of which the said plaintiff was presumed to have notice, gave her no right to a passage upon the train, and in the eye of the law she was a trespasser thereon, and no recovery can be had in this action." Refused.

(3.) "If Mrs. O'Hara rode upon the train upon a free pass, of the description given to employees engaged in the performance of their duties on and about the railway of the defendant, upon which pass was printed the condition that the person using the same assumed all risk of accident and damage; and the accident was caused by the negligence of the employees of defendant on the train occupied by the plaintiff, or of the employees of defendant on the following train, the plaintiffs cannot recover." Refused.

(As to the suit by Hugh O'Hara.)

(1.) "If Mrs. O'Hara, with the knowledge and consent of her husband, accepted and rode upon a free pass of the description given to employees, the plaintiff, being likewise an employee, upon which pass was printed, as the condition of the contract, that the person accepting assumed all risk of accident and damage to person or property, and said pass was signed by the superintendent of the company, and there was no proof of higher authority for the same, the plaintiff cannot recover." Refused.

The court, after stating the facts as above, charged the jury, *inter alia*, as follows:

"The defendant claims that the plaintiff cannot maintain this suit, because she was not an employee of the defendant, and was travelling on a free pass, issued in violation of law. We say to you that this is not a defence. Even if we adopt the presumption that Mrs. O'Hara was bound to know the law, she held a free pass signed by the superintendent of the road, countersigned by the foreman of the track section. The conductor of the train, whose peculiar duty is to determine the right of a passenger on his train, recognized her right to a seat under the pass, and having done so, it is not for the defendant to urge that the pass was issued in violation of the law.

"Defendant also claims that as Mrs. O'Hara accepted and rode upon a pass of the kind given to employees, she occupied the position of an employee, so far as the cause of action is concerned, and cannot recover for the injury occasioned by the fault of another employee of the road, in the absence of evidence showing the neglect of the superintending officer or officers of the defendant.

"As to this, we say to you, that Mrs. O'Hara is not, so far as the evidence shows, in the position of an employee of the defendant, and her right to recover is not to be determined by the same rules as that of an employee. We think, and so instruct you, that Mrs. O'Hara, for anything that appears in the evidence, is to be regarded as a passenger, with the right to recover damages for injuries occasioned by the neglect of the defendant or its agents or employees acting within the lines of their general employment; and that whether the conductor of the special train was or was not managing his train in defiance of the rules of the road, the defendant is lia-

ble for the injury resulting from his negligence. And we further say to you, that the conditions on which the pass in this instance was given and accepted do not exempt the defendant from liability for injuries sustained by the plaintiff in consequence of the neglect or carelessness of the conductor of the special train. We do not understand the defendant to claim that the collision resulted from an act of God, or by any unavoidable accident. On the other hand, we understand the defendant to assert that it was the result of negligence; but the ground of the defence is that the negligence was not the negligence of the defendant, but that of the person or persons in charge of the special train, running in violation of the rules and in defiance of the directions of the defendant, and that for this wrong the defendant ought not to be held responsible under the unquestionable facts in this case. We have already said in substance, and we repeat, that this ground of defence is not good."

(The charge in the action by O'Hara for loss of services was to the same effect. The only legal difference being in regard to the measure of damages.)

The jury rendered verdicts of \$700 for Mrs. O'Hara, and \$3000, afterwards reduced to \$2000, for Hugh O'Hara, and judgments were entered accordingly, whereupon the defendant took these writs, assigning for error, *inter alia*, the answers to the points above stated, and that part of the charge above cited.

Samuel Gustine Thompson (T. F. Richey and Hancock and Glems with him), for plaintiff in error.

Mrs. O'Hara not being an employee and riding on a pass legally issued to her, had no right upon the train, but was a trespasser, and therefore cannot recover. Constitution of 1873, P. L. 1874, 25; Act 1874, P. L. 289; *Flowers v. Pa. R. Co.*, 19 Smith, 210.

Although she was on the train by permission of the company's officers and servants, she was nevertheless a trespasser, because in granting such permission the company's agents acted illegally and therefore *ultra vires*. *Green's Brice's Ultra Vires*, 362; *Allegheny Valley R. Co. v. McLain*, 10 Norris, 442; *Duff v. Allegheny Valley R. Co.*, 10 Norris, 458.

While it is well settled that a common carrier cannot exempt itself from liability in case of negligence in the performance of its duty as carrier, yet when it undertakes that which it is not required to do, it may make any contract which may be agreed upon by the parties, in regard to liability for accident. *Lockwood v. R. M. E.*, 17 Wall. 357.

It is not a part of the duty of a railroad company to carry passengers free. It follows therefore that this contract with Mrs. O'Hara that she should assume all risks of accident can be enforced. *McCauly v. The Furness R. Co.*, 21 L. J. 4 Q. B.; *Gallin v. London & N. W. R. Co.*, 10 L. R. Q. B. 214; *Poucher v. M. C. R.*

Co., 48 N. Y. 263; *Stinson v. N. Y. Cent. R. Co.*, 32 N. Y. 333; *Kinney v. R. Co.*, 34 N. J. 510.

B. J. & A. B. Reid and E. L. Davis, for defendants in error.

Mrs. O'Hara was not a trespasser. If the conductor, in obedience to the State Constitution, had chosen not to recognize the pass, he could not have ejected her without first demanding fare.

She occupied the position of a person allowed by the conductor to ride in a car as a passenger without paying fare. *Duff v. Allegheny Valley R. Co.*, 10 Norris, 461.

The company cannot set up its own illegal act in issuing the pass, and thus make a trespasser of one who acted on the faith of its written permit.

The non-payment of fare does not deprive the defendants in error of their right of action. *Phila. & Reading R. Co. v. Derby*, 14 Howard, 468; *The Steamboat New World v. King*, 16 Howard, 424; *Pa. R. Co. v. Henderson*, 1 Smith, 327.

Nor does the release of damages printed on the pass operate to exempt the plaintiff in error from liability. "Common carriers cannot so limit their liability by special notice or contract as to relieve themselves from the consequences of their own or their servants' negligence." *American Express Co. v. The Second National Bank of Titusville*, 19 Smith, 395; *Empire Trans. Co. v. Wamsutta O. M. Co.*, 13 Id. 14; *Pa. R. R. Co. v. Henderson*, 1 Id. 325; *Pa. R. R. Co. v. Butler*, 7 Id. 335; *Ill. Cent. R. Co. v. Read*, 37 Ill. 484.

THE COURT.—A common carrier cannot protect himself by special contract from liability for negligence. Against his extraordinary liability as a common carrier he may protect himself by such a contract, but not from his liability as a simple bailee. Such is the well-settled law of this Commonwealth. It may well be doubted whether the proviso in this pass being against accidents can be held applicable at all to cases where the injury has resulted from negligence. If the free pass in this case was unlawful, the conductor should have demanded the regular fares, and his not doing so did not make O'Hara and his wife trespassers or destroy their rights as passengers.

Judgment affirmed in each case.

9 A. & E. R. Cas.—21

SWIGERT

v.

THE HANNIBAL AND ST. JOSEPH R. R. Co., Appellant.

(75 Missouri Reports, 475, 1882.)

The rules laid down in *Straus v. R. R. Co.*, ante, p. 185, affirmed.

Instructions offered by the parties but amended by the court before being given are to be considered as if given by the court of its own motion, and the fact that counsel read them to the jury will not operate a waiver of exceptions duly taken to the action of the court.

Instructions so drawn as to put upon the plaintiff the onus of showing that he was not guilty of contributory negligence are properly refused.

The negligent acts of a defendant which will subject him to liability notwithstanding the contributory negligence of the plaintiff are such as are committed after he becomes aware of the danger to which plaintiff has exposed himself.

It is not necessarily negligence to attempt to get on a train which had started from a station. The rate of speed and whether the train was stopped a sufficient length of time to enable passengers to get on, are circumstances to be considered in deciding the question.

The fact that the conductor of a railroad train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start.

Railroad trains are bound to stop at stations a reasonable length of time to enable passengers to get on.

APPEAL from Linn Court of Common Pleas.

Geo. W. Easley, for appellant.

Huston & Brownlee, for respondent.

HOUGH, J.—This is an action to recover damages for personal injuries received by the plaintiff in attempting to board one of the defendant's passenger trains. The petition alleges: That the agents and servants of defendant in charge of said train negligently failed to stop the train at said Bucklin station a reasonable length of time to permit plaintiff to get on said train, and while plaintiff was attempting to get on said train those in charge of said train negligently and carelessly started said train rapidly forward, whereby the plaintiff was struck by the cars of the said train, knocked down and very severely injured, etc. There was testimony tending to show that the train was five hours behind time, and that it did not stop a reasonable length of time to permit the plaintiff to get on, and that the conductor saw the plaintiff attempt-

ing to get on, and started the train while he was so in the act of getting on. There was testimony tending to show, also, that the train stopped a reasonable time, that the plaintiff was intoxicated and by his conduct and conversation induced the conductor to believe that he did not intend to take passage on his train, and that while going toward the coach, he fell and was injured.

For the plaintiff the court gave the following instructions:

1. It was the duty of those in charge of the train to bring it to a full stop at the platform at Bucklin, and to stop there a reasonable length of time to allow passengers to get off and on in safety; and if the jury believe from the evidence that they did not do so, or that they started up at an unusual rate of speed, or with unusual suddenness, and that plaintiff was injured thereby without fault on his part, then they are bound to find for plaintiff.

2. Although the jury should believe from the evidence that plaintiff was intoxicated, and was negligent, yet if they further believe that the conductor of the train could have prevented the injury to plaintiff by exercising ordinary care, prudence and caution after he discovered the danger in which plaintiff was placed, and that he failed to do so, then the verdict should be for plaintiff.

3. Even should the jury believe that the train stopped long enough for plaintiff to have got on if he had started to do so as soon as the train came up, yet if the conductor saw the plaintiff in the act of getting on the car, and while plaintiff was so in the act of getting on the car the conductor gave the signal to go ahead, and the train was suddenly started before plaintiff could get into the car, and plaintiff was thereby knocked down and hurt, then the finding should be for plaintiff.

4. If the jury find for plaintiff, they should allow him for all his loss of time and medical expenses occasioned by his injury, and should also take into consideration and allow him for his physical sufferings, and his diminished ability to labor, caused by the injury, both present and future.

The defendant asked the following instructions:

1. Unless plaintiff has shown by the preponderance of the evidence in his favor, and to the satisfaction of the jury, that he was injured by defendant's train by reason of the negligence and want of care of defendant's employees in charge of said train, and that plaintiff was guilty of no negligence which contributed directly to said injury, the verdict of the jury must be for defendant.

2. If the jury believe from the evidence that the train stopped at Bucklin station long enough to enable plaintiff to get safely or if he had availed himself of the time when the train was stopped, and had not been disabled by intoxication, then the jury must find for defendant.

3. If the jury believe from the evidence that plaintiff was guilty of negligence in attempting to get on the train, and that

such negligence contributed directly to the injury sustained by plaintiff, he cannot recover, although the jury may further believe that defendant's employees in charge of said train were to some extent negligent in starting said train.

4. If the jury believe from the evidence that the train stopped at Bucklin station, and after it had started plaintiff attempted to get on the step of the car, and in attempting to do so fell and got injured, then such act on his part constituted negligence, and the verdict should be for defendant.

5. If the jury believe from the evidence that the train stopped at Bucklin station a sufficient length of time to enable a man using ordinary diligence to get on the train with safety, then the verdict must be for defendant.

6. If the jury find from the evidence that both plaintiff and defendant by their negligence immediately contributed to produce the injury, plaintiff cannot recover, and the verdict must be for defendant.

7. If the jury believe that the actions and talk of plaintiff were sufficient to and did induce the conductor to believe that plaintiff did not intend going upon his train, then defendant is not to be charged with negligence by reason of said conductor having started it, without regard to the length of time said train may have been stopped or when it started.

8. If the jury believe from the evidence that the conductor in charge of the train did not know that plaintiff was about to get on his train, then negligence cannot be imputed to defendant, and the verdict should be for defendant.

9. If the jury believe from the evidence that plaintiff, while on the platform at the depot, and while going toward the car, and without fault or negligence of defendant's agents, with the intention of taking passage thereon, tripped and fell toward and against the car, and by reason of so falling, received all the injuries complained of, then he cannot recover, and the verdict must be for defendant.

10. Plaintiff was guilty of negligence under the circumstances in proof in attempting to board the train at the time he so attempted, and the jury must, therefore, find their verdict for defendant.

The court gave the second and third, and refused the remainder.

The court then gave the first instruction after adding thereto the words, "Unless the jury shall further believe that such injury might have been avoided by the use of ordinary care and prudence on the part of defendant's agents and servants;" and also gave the fourth, after adding thereto the words, "Unless such injury might have been prevented by the use of ordinary care and prudence on the part of defendant's agents, or any of them." The court also gave, of its own motion, the following instruction: "If the jury

believe from the evidence that plaintiff, while on the platform at the depot, and while going toward the cars with the intention of taking passage thereon, tripped and fell toward and against the car, and by reason of so falling, and without fault or negligence on the part of defendant's agents or servants, received the injuries complained of, then he cannot recover, and the finding should be for defendant." There was a verdict and judgment for plaintiff, and the defendant has appealed.

The word "and" should be substituted for the word "or" where the latter word first occurs in the first instruction given for the plaintiff, in order to make the instruction conform to the charge of negligence contained in the petition. With this exception we perceive no error in the instructions given for the plaintiff. They are in harmony with the rules applicable to cases of this kind, announced in the case of *Strans v. R. R. Co.*, ante, p. 185.

As it appears from the record that the defendant excepted to the refusal of instructions numbered one and four as asked by it, and also excepted to the amendment of said instructions, made by the court, we must regard these instructions as amended, as having been given by the court of its own motion. The fact that the defendant excepted to the amendments made, shows that it did not accept them, although its counsel may have read them to the jury.

The first instruction asked by the defendant was properly refused for two reasons. It was inapplicable to the facts of the case. On the testimony adduced, the jury might have found that the plaintiff was entitled to recover, notwithstanding he had been guilty of contributory negligence. In the second place it improperly placed upon the plaintiff the onus of showing not only that he had been injured by the negligence of the defendant, but also that he himself had not been guilty of contributory negligence. *Bueschling v. Gaslight Co.*, 73 Mo. 229.

Nor should this instruction have been given as modified by the court. The modification did not correct the errors we have pointed out; and besides it was in itself erroneous. It should have restricted the liability of the defendant to negligent acts committed by its servants after they became aware of the danger to which plaintiff's negligence had exposed him. *Nelson v. R. R. Co.*, 68 Mo. 593.

As this case must be retried, it will be proper to observe that the defendant's second instruction should not have been given, for the reason that it is in direct conflict with the third instruction given for the plaintiff.

Defendant's third instruction directs a verdict for it, although its servants may have negligently started the train after becoming aware of the plaintiff's negligence. This instruction should not be given when the case is retried without some modification.

Defendant's fourth instruction erroneously declares the effort of

the plaintiff to get on the train while in motion to be negligence per se, without regard to the speed of the train, or the fact that it may not have been stopped a sufficient length of time to enable the plaintiff to get on before it was again started, and it is, therefore, unnecessary to notice the modification of this instruction made by the court.

Defendant's fifth instruction was properly refused. It is in conflict with the third given for the plaintiff.

The sixth is too general, and is not applicable to the facts in evidence. It directs a verdict for the defendant, even though it may have been guilty of negligence after becoming aware of the plaintiff's negligence.

The seventh is erroneous and inconclusive, and was properly refused. It ignores the fact that the conductor, notwithstanding the conduct and conversation of the plaintiff, may have seen him attempting to get on the train when he started it.

The eighth was properly refused. It ignores the duty of the defendant to stop its train a reasonable time. Even though the conductor may not have known that the plaintiff was in the act of getting on the train when he started it, yet if he so started it without allowing a reasonable length of time for the plaintiff to get on, he was guilty of negligence.

The ninth was given by the court of its own motion in paraphrase.

The tenth is erroneous, and was properly refused. Whether the plaintiff was guilty of negligence in attempting to get on the train was a question of fact for the jury, inasmuch as the testimony was conflicting in regard to that matter. For reasons heretofore stated, the judgment will be reversed and the cause remanded. The other judges concur.

MILLEN

v.

BRASCH & Co.

(*L. R.*, 9 *Q. B. Div.* 143. *Dec.* 20, 1882.)

A carrier is not deprived of the protection afforded by the Carriers' Act (11 Geo. 4, & 1 Wm. 4, c. 68), s. 1, merely by the fact that the loss of the goods is temporary and not permanent, nor can the owner of goods, which ought to have been but were not declared pursuant to that statute, recover damages for the consequences of the loss of them, as distinguished from the loss itself.

The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence

the trunk was put on board a vessel bound for New York, where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers' Act, the value of which exceeded £10. The plaintiff was obliged to replace at enhanced prices the articles within the Carriers' Act contained in the trunk.

Held, that the plaintiff could not recover from the defendants damages either for the temporary loss of the articles within the Carriers' Act or for being obliged to replace them at enhanced prices, a carrier being protected by the statute not only as to a loss but also as to all consequences flowing from it.

APPEAL by the defendants from the judgment of Lopes, J., after the trial. 8 Q. B. D. 35. See 6 Am. and Eng. R. R. Cas. 590.

The facts of the case are sufficiently stated in the judgment of the Court hereafter set forth.

Nov. 27. C. Russell, Q. C., and F. P. Tomlinson, for the defendants. It is unnecessary for the defendants to contend that the damages awarded by Lopes, J., are too remote, for they are not otherwise recoverable. *Hearn v. London and South Western Ry. Co.*, 10 Ex. 793, may appear to be against the defendants, but it is not a decision in point for the present case, because it is consistent with the pleadings in that case that the plaintiff's property during the time of its alleged loss was really in the defendants' possession. In the present case the alleged cause of action is that the plaintiff's trunk was by the carelessness of the defendants' servants sent to the United States instead of to Italy; but a carrier is not deprived of the protection afforded by the Carriers' Act by the fact that the loss of or injury to the goods intrusted to him happens through their being taken by him to a wrong destination: *Morriss v. North Eastern Ry. Co.*, 1 Q. B. D. 302. The plaintiff's trunk was lost when it was taken to the Victoria Docks; it was, therefore, lost on land, and the defendants are protected by the Carriers' Act from every kind of liability.

Edward Pollock, for the plaintiff. This case falls within the principles laid down in the judgment in *Hearn v. London and South Western Ry. Co.*, 10 Ex. 793; it is a binding authority even in this Court, for it explains the true construction of the Carriers' Act. A chattel, which is missing for a time, and is afterwards, but before action, found, cannot be said to be lost within the meaning of the Carriers' Act; although possibly a different rule may apply where the chattel comes to light after an action has been commenced. It is unnecessary to argue on behalf of the plaintiff, that in order to fall within the protection of the Carriers' Act the "loss" must be a total and permanent deprivation of the goods; for in the present case the missing goods have been restored to the plaintiff before action brought. The plaintiff can recover damages for the detention of the trunk, even if he cannot recover the value of the goods which ought to have been declared.

Moreover, the Carriers' Act applies only to contracts of carriage

by land; but the "loss" happened through the plaintiff's goods being sent across the sea to New York.

[BRETT, L. J.—The goods were on land when they were first mis-sent; moreover, if the plaintiff is dissatisfied with the amount of the judgment, he ought to have given a notice by way of cross-appeal.]

F. P. Tomlinson replied.

Cur. adv. vult.

Dec. 20. The judgment of the Court (Baggallay, Brett, and Lindley, L. JJ.) was delivered by

LINDLEY, L. J.—The facts in this case, which was tried before Lopes, J., without a jury, are shortly as follows:

The defendants are carriers for hire from London to Rome. On the 13th of November the plaintiff's agent delivered to the defendants a trunk to be sent by rail from London to Liverpool and there shipped in one of Bibbey's steamers for Italy. The defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger of New York. By the carelessness of the defendants' servants the trunk belonging to the plaintiff was taken to the Victoria Docks and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until about the 15th of December, 1879. On the 15th of December the defendants wrote to Hamburger, and on the 19th of December the trunk arrived in New York. On the 27th of February, the plaintiff claimed £210 for the loss of the trunk and injury to its contents. On the 11th of March the trunk arrived at the defendants' offices, and at the plaintiff's request was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and the loss for the time was admitted. It was also admitted that some of the contents of the trunk were injured in New York owing to the Custom House officers unpacking the trunk and negligently and unskilfully repacking it. It was also admitted that the silk dresses and sealskin jacket are articles within the Carriers' Act, that their value exceeded £10 and that no declaration was made.

Lopes, J., held, first, that the goods were lost within the true meaning of the Carriers' Act, although their loss was only temporary; secondly, that the defendants were liable to pay damages for the loss and detention of those articles of apparel which there was no necessity to declare; thirdly, that the defendants were not liable to pay damages for the loss of or injury to the silks and furs, which ought to have been declared and were not declared; but fourthly, that the defendants were nevertheless liable to pay damages for the detention of those articles. The learned judge accordingly gave judgment for the plaintiff for £5 beyond the sum of £5 paid into court, with costs. The £5 paid into court was sufficient to

cover the damages to which the plaintiff was entitled in respect of the loss and detention of those articles, which there was no necessity to declare; and substantially the question raised by the appeal to this Court is as to the liability of the defendants to pay damages for the loss or detention of the silks and furs which were not declared.

In holding that the defendants were liable to damages for the detention, although not for the loss of these articles, the learned judge followed what he understood to be the law as laid down in *Hearn v. London and South Western Ry. Co.*, 10 Ex. 793. That case, at first sight, appears in favor of the plaintiff. But if the pleadings demurred to are carefully examined, it will be found that the plaintiff, in his new assignment, carefully negatived the loss of the goods for the detention of which he was suing, and the point really decided was that where goods, which ought to be declared, and are not declared, are detained by a carrier without being lost by him he is liable for such detention. This is consistent with the language of the Carriers' Act, which exonerates carriers from liability for loss of or injury to certain kinds of goods if not declared, but does not exonerate carriers from their liability for the undue detention of such goods. In this case, however, the learned judge found as a fact that the goods were lost within the meaning of the Carriers' Act, although the loss was only temporary; and assuming this finding to be correct it appears to us impossible to hold the carriers irresponsible for the loss, but responsible for detention caused by the loss. There is nothing in the Carriers' Act to warrant such refinement; nor does the decision in *Hearn v. London and South Western Ry. Co.*, 10 Ex. 793, as has already been shown.

Let us consider the question apart from authority, and let us take first the case of goods permanently lost. The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers' Act protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable. So in the case of a temporary loss by the carrier; to hold him not liable for the loss but liable for the consequences of it is practically inconsistent, and so to construe the Carriers' Act would in effect be to render it inoperative. It is to be observed that the Carriers' Act protects the carrier from "liability for the loss of or injury to" undeclared goods; the Act does not simply relieve him from paying the value of undeclared goods which he loses; he is relieved from liability for their loss, and it would be to fritter away the Act and to depart from sound principles of construction to hold that "loss" in the Act

only means "value" as distinguished from "loss" and its consequences.

If we turn to authority we shall find that this view of the Act is supported by two decisions, one in this country and one in Ireland, viz., *Piancini v. London and South Western Ry. Co.* (18 C. B. 226) and *Wallace v. Dublin and Belfast Ry. Co.* (Ir. R., 8 C. L. 341). Both of these cases were decided on demurrer. The first shows that where goods are lost and the owner cannot recover the loss he cannot recover for non-delivery which is occasioned by the loss, and further, that where goods are detained but not lost the carrier is not protected. The case of *Wallace v. Dublin and Belfast Ry. Co.* (Ir. R., 8 C. L. 341) appears to have been very like the case now before us, for the goods were there alleged to have been lost by the carriers, although only for a time, and the Court held that the Carriers' Act applied and protected carriers from liability as well for the temporary as for the permanent loss of undeclared articles, and also from liability for the consequences of such loss. This appears to us to be the proper construction of the statute.

The result comes to this: if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers' Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner: see *Hearn v. South Western Ry. Co.*, 10 Ex. 793; and this again must depend on the facts of each particular case. If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them he will not be liable; but if he keeps them after he has recovered them, the Carriers' Act will not protect him from such subsequent breach of duty. The obligation on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future breaches of that obligation. It is therefore a mistake to suppose that it will be against the carrier's interest to try and find undeclared goods temporarily lost. The utmost that can be said on that subject is that he will gain nothing by finding them. On the other hand, to hold him liable for their detention when temporarily lost, but not when permanently lost, would be to make it beneficial to him not to find them. If that were the law it would be to his interest to convert all temporary losses into permanent losses. This anomaly would, no doubt, be obviated by holding the carrier also liable for the detention of goods permanently lost, but in our opinion this cannot be done.

As already stated, the learned judge held, that in this particular case the goods were temporarily lost by the carrier, within the true meaning of the Carriers' Act. The defendants naturally supported that view of the facts; but the plaintiff contested the

conclusion arrived at on this point, and we have therefore considered it; and we agree with the learned judge in thinking that the trunk was lost. As we understand the facts, the plaintiff's trunk was shipped and sent to New York as Hamburger's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered; and the carriers had lost possession of the trunk, and did not in fact know where it was nor what had become of it. This was, in our opinion, a loss of the trunk by the carriers; for although they had the bill of lading, the trunk was not referred to in it. For the reasons above given, we are of opinion that the trunk being lost the defendants were not liable for any damages in respect of the loss or detention of or injury to the silks and furs contained in the trunk; and that the defendants, having paid into court enough to cover their liability for the other articles, are entitled to judgment in the action with costs and to the costs of the appeal.

Judgment reversed.

BALTIMORE AND OHIO R. R. Co.

v.

HUMPHREY.

(*Advance Case. Maryland, 1888.*)

Where a carrier fails to deliver goods entrusted to him for transportation the true measure of damages is the value of the goods at the point of destination at the time they should have been delivered, together with the interest thereon, and a reasonable compensation for any expenses which were the natural and proximate consequences of the carrier's act.

A loss sustained by the consignee in his general business in consequence of special circumstances unknown to the carrier making the failure of the goods to arrive of peculiar moment to such consignee, does not constitute a valid ground for recovery.

Carriers are bound in all cases to be diligent in their efforts to secure a delivery of goods to the parties entitled, but will be protected in refusing delivery until reasonable evidence is furnished that the party claiming is the party entitled, provided they act bona fide in the premises.

Where the mark upon the goods differed from that in the way-bill, this circumstance was *held*, to justify the carrier in exercising caution in delivering the goods, and may be submitted to the jury in this connection.

It is for the jury in such case to decide whether the delay in the delivery was reasonable, and caused solely by the delay in identifying the goods.

JOHN K. COWAN, John E. Smith, Wm. A. McKellip, J. A. C. Bond, for plaintiff in error.

W. J. O'Brien, G. E. Cramer, for defendant in error.

STONE, J.—This action was brought by the plaintiff against the defendant, a common carrier, for the breach of a contract. The declaration states that the defendant undertook to carry, for hire, certain goods of the plaintiff from the city of St. Louis and deliver the same to him in the city of Baltimore, and alleges, as the breach of the contract, that the defendant wantonly, negligently and maliciously refused to deliver to him the same, and that thereby the plaintiff was not only deprived of said goods, but that his business was by such refusal seriously injured. The foundation of the action was a contract made between the plaintiff and defendant, and the breach of that contract on the part of defendant. The suit was brought for a wrong, dependent upon a contract, and the first question we have to decide is, what is the true measure of damages in such a case? It makes no difference whether the form of the action is *ex delicto* or *ex contractu*, the real and substantial gravamen of the complaint is the alleged breach of the contract; and in such a case the same law is applicable to both classes of action. In actions like the present against common carriers, the suit may be framed either *ex contractu* upon the breach of the engagement, or *ex delicto* upon the violation of the public duty; but whether the action be *assumpsit* on the contract, or case for the violation of duty, the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement merely.

There are many actions, nominally, in tort, which, in respect to the measure of relief, are treated as virtually *ex contractu*; and in these cases a fixed rule of damages is adhered to. 2d Addison on Torts (7th ed.), 355 and 454.

The true measure of damages, in a case like the present, has been settled by this court in more than one case. In the case of *U. S. Telegraph Co. v. Gildersleeve*, 29 Md., 232, the court says: "Lastly, as to the measure of damages, if there be a breach of the contract. This is a subject about which there has been a considerable diversity of opinion and great want of precision in the attempts to define rules of general application. But by the latest and best considered cases upon the subject, the rule seems to be now pretty well established that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence, which is not the necessary or ordinary result of a breach, can be supposed to be contemplated, unless full information be imparted to the party sought to be held liable at the time of entering into the engagement." The court, in the same opinion, quote and adopt the opinion in *Hadly v. Boxendale*, 9th Exch. 341, in which the court said: "We think the proper rule in such a case as the present is, where two parties have made a contract which one of them has broken, the damages which the

other party ought to receive, in respect to such breach of contract, should be either such as may be fairly and substantially considered as arising naturally—that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.” This latter case is also adopted by this court in the case of the Camden Consolidated Oil Co. v. Schlens & Co., recently decided.

It is equally well settled that, as a general rule, the measure of the damages in such cases is the value of the goods at the place of their destination, with compensation for the actual loss which is the natural and proximate consequence of the act, and excluding remote or indirect losses. 2d Sedgewick, 356.

The cases of *Brown & Otto v. Werner*, 40 Md. 15, and *Shafer v. Wilson*, 44 Md. 268, are not in conflict with the cases before cited. These latter cases were for torts, entirely independent of contract, and the damages allowed were the immediate and direct consequences of the defendant's wrongful act.

The interruption and injury to the trade and business of the plaintiff was the necessary and immediate consequence of the wrongful act of the defendants by their damage done to the house in which the business was carried on. In these cases there was no contract, and consequently no breach of contract whatever. In the present case the rule is different, and the true measure of damages was the value of the goods in Baltimore on the 21st of August, 1880, with interest thereon, with a reasonable compensation for expenses, if any, which were the natural and proximate consequences of the act excluding remote or indirect losses. The loss sustained by the plaintiff in his general business does not come under this rule. To be responsible for any such consequence was no part of the contract in this case, and was not for a moment contemplated by the defendants when they undertook to transport the goods from St. Louis to Baltimore. The special circumstances now set up and relied on by the plaintiff were wholly unknown to the defendants at the time of the contract, and it would be unjust now to hold it responsible for consequences never contemplated by it. Had the special circumstances been disclosed, the parties might have expressly provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive him. It follows from what we have said that the court below was in error in admitting the evidence excepted to in defendant's bill of exceptions, and also in granting the second prayer of plaintiff.

The other question arising in this case was the right of the defendant to refuse to deliver the goods on the 21st of August, 1880. Common carriers deliver property at their peril: for if delivery be

to a wrong person they will be responsible to the rightful owner. It is their duty, therefore, in all cases, to be diligent in their efforts to secure a delivery to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so they act in good faith and solely with a view to a proper delivery; but it is their duty in all cases to be diligent in their efforts to secure a delivery to the person entitled. *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34. In this case, the mark upon the goods differing from the way-bill justified the defendants in exercising caution, and it was a proper question to have been submitted to the jury whether the refusal was qualified as alleged by the defendants, and, if so, whether the delay in the delivery was reasonable, and caused solely by the difficulty in identifying the goods.

These two facts, good faith and due diligence, were questions for the jury. We think these questions were substantially submitted to the jury by the tenth prayer of the defendant, which was granted by the court. The defendant gave testimony tending to prove that so soon as the telegram was received from St. Louis on the 23d of August they notified the plaintiff that he could get the goods, and that the goods were then in good order.

The plaintiff, on the other hand, offered evidence tending to prove that he did not receive notice that he could get the goods until the 26th or 27th of August, and that the goods were not then in a good condition. In this state of the proof, the jury, as they had the undoubted right to do, found a verdict for the plaintiff. This verdict we are not disposed to disturb, notwithstanding the erroneous instruction given to the jury by the granting of the second prayer of the plaintiff, as it is apparent from the record that the defendants were not thereby injured.

It is very apparent from the verdict, itself, that the jury did not take into consideration, in assessing the damage, any injury to the business of the plaintiff, but only gave what they considered the actual value of the goods in Baltimore, with expenses and interest. They had before them the cost of the goods in St. Louis, and adding thereto freight, interest and a small sum for the difference in the price of the goods between St. Louis and Baltimore, will make the amount of their verdict.

Judgment affirmed.

We propose in this note to consider at some length the important questions raised in the above-reported case, as to the measure of damages in an action against a carrier for the loss of goods entrusted to him, or for unreasonable delay in their transportation, including the question as to the right to recovery damages consequential in their nature.

Measure of Damages in Case of Loss.—The general rule is, that where goods confided to a common carrier are lost in course of transportation, the measure of damages is the value of the goods at the point of destination at the

time when they should have arrived, together with interest from said date, less the amount of the freight.

Measure of Damages in Case of Decay.—Where the goods are unreasonably delayed, the measure of damages is similar, viz., the difference between the market value of the goods at the time they should have arrived and their actual value when they do arrive, with interest from the former date, less the freight.

The authorities in support of these propositions are extremely numerous.

Peet v. Chicago & N. W. R. R. Co., 20 Wisc. 594; Cutting v. Grand Trunk R. R. Co., 18 Allen, 381; Ward v. New York Central R. R. Co., 47 N. Y. 29; Sisson v. Cleveland & Toledo R. R. Co., 14 Mich. 489; Spring v. Haskell, 4 Allen, 112; Dean v. Vaccaro & Co., 2 Head, 488; Ingledew v. Northern Railway, 7 Gray, 86; The Vaughan & Telegraph, 14 Wall. 258; Wibert v. New York & Erie R. R. Co., 19 Barb. 36; Lakeman v. Gunnell, 5 Bosw. 625; McHenry v. Phila., W. & B. R. R. Co., 4 Harring. 448; Scott v. Boston & New Orleans S. Co., 106 Mass. 468; Rice v. Baxendale, 7 H. & N. 96; British Columbia, etc., Co. v. Nettleship, L. R., 3 C. P. 499; Kansas Pac. R. R. Co. v. Reynolds, 8 Kans. 623; Michigan S. & N. Ind. R. R. Co. v. Carter, 13 Ind. 164; Holden v. New York Central R. R. Co., 54 N. Y. 662; Illinois Central R. R. Co. v. McClellan, 54 Ill. 58; Blumenthal v. Brainerd, 38 Vt. 402; Faulkner v. South Pac. R. Co., 51 Mo. 311; Chicago & N. W. R. Co. v. Dickinson, 74 Ill. 249; Weston v. Grand Trunk R. R. Co., 54 Me. 376; Bailly v. Shaw, 24 N. H. 297; Ringgold v. Haven, 1 Cal. 108; Hart v. Spalding, 1 Cal. 213; Galena & Chicago It. R. Co. v. Rac, 18 Ill. 488; Chicago & N. W. R. Co. v. Sambre, 87 Ill. 195.

And the rule as to delay applies even when there has been no contract by the carrier to transport and deliver the goods within a specified time, for the law in such case always implies an undertaking to perform the transportation within a reasonable time.

Chicago & Alton R. Co. v. Thrapp, 5 Ill. App. 502.

The carrier defendant cannot complain that evidence as to the value of the goods is confined to the place of shipment, as the presumption is, in the absence of other evidence, that their value there is less than at the point of destination. Rome R. R. Co. v. Sloan, 89 Ga. 636.

Measure of Damages in Case of Refusal to Transport Goods.—In an action to recover damages for breach of a contract to transport goods and deliver them at a specified time and place, where the goods have never been taken into the carrier's possession, the measure of damages is the difference between the value of the goods at the time they were to have been delivered by defendant at the point of destination, and the value of goods of the same quality at the same time in the place of shipment, together with interest on said amount from the time the goods should have arrived, less the cost of transportation. Galena & Chicago Union R. Co. v. Rac, 18 Ill. 488; Cowley v. Davidson, 13 Minn. 92; Harvey v. Connecticut & P. R. Co., 124 Mass. 421.

And where the article which the carrier refuses to carry is perishable in its nature, the shipper must not remain supine, but must adopt whatever means are at hand to forward the goods at once. He cannot at his leisure send them forward in parcels, and hold the carrier liable for the difference in freight. Ward's Central & Pacific Lake Co. v. Elkins, 34 Mich. 489.

Measure of Damages in Case of Delivery at Wrong Destination.—Where the carrier delivers goods at the wrong destination, the measure of damages is the difference between the value of the goods at the point where they are delivered and the value at the point where they should have been delivered. Galena & Chicago Union R. Co. v. Rac, 18 Ill. 488.

Measure of Damages in Case of Refusal to Deliver.—Where the carrier refuses to deliver the goods, except upon an unreasonable condition, this will be deemed equivalent to a conversion, and the measure of damages will be

the value of the goods at the time of the conversion. *Loeffler v. Keokuk Natl. Line P. Co.* 7 Mo. App. 185; *Rice v. Indianapolis & St. Louis R. Co.*, 8 Mo. App. 27.

How Value is Estimated.—In order to determine the value of the goods at the point of destination, the current newspapers, giving the general state of the markets, are admissible in evidence, and are deemed far more reliable than private memoranda. *Sisson v. Cleveland & Toledo R. Co.*, 14 Mich. 489.

Where the only evidence of value is the price stated in the bill where the goods were purchased, the jury is confined to this alone. *Blumenthal v. Brainerd*, 38 Vt. 402.

Where the liability of the first carrier has terminated short of the point of destination by handing the goods over to a connecting line, the condition of the goods at the point of destination is nevertheless admissible in an action against the first carrier for an unreasonable delay occurring on his line. *Marshall v. New York Central R. R. Co.*, 45 Barb. 502.

Measure of Damages where Goods are Damaged by Delay.—The mere fact that the goods are damaged by the delay does not render the carrier liable for their full value, if they are still applicable to the intended use. *Hackett v. B. C. & M. R. Co.*, 35 N. H. 890.

Where goods have been delayed, and, on their arrival, expense is necessarily incurred to put them in salable condition, the carrier must also bear this expense. *Winne v. Illinois Central R. Co.*, 31 Iowa, 583.

Interest.—As has been said, interest is allowed on the amount recovered from the time when the goods should have been delivered. *Kyle v. Laurens R. R. Co.*, 10 Rich., S. C. 382; *Robinson Bros. v. Merchants' Dispatch Co.*, 45 Iowa, 470. But the allowance of interest is to some degree within the discretion of the court, and where there has been no negligence on the carrier's part, the recovery of interest is not permitted. *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

Factor's Commission.—The amount of the factor's commission on the value of the goods is not allowed as an abatement. *Kyle v. Laurens R. R. Co.*, 10 Rich., S. C. 382.

Freight.—Although the amount of the freight is generally deducted from the damages, yet there can be no such deduction when the amount of the freight does not appear. *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

Measure of Damages where Goods are Sold.—Where goods are forwarded by a carrier in pursuance of a contract of sales between the consignor and consignee, the contract price furnishes the measure of damages in case of loss or delay. *Illinois Central R. Co. v. McClellan*, 54 Ill. 58; *Medbury v. New York & Erie R. Co.*, 26 Barb. 564. And where, in consequence of such delay, the vendee refuses to accept the goods, and in consequence they have to be subsequently sold, the measure of damages is the difference between the contract price and the value on the day when they are actually delivered. *Deming v. Grand Trunk Railroad Co.*, 48 N. H. 455.

This rule applies even when the consignee has, under the contract, the option to accept or refuse the goods. *Magnin v. Dinsmore*, 62 N. Y. 85.

Where Special Damage is Occasioned by Loss or Delay.—Many important questions have arisen where special damages have been occasioned by loss or delay in determining how far the special circumstances may be taken into account. The rule upon this point is thus laid down in *Medway v. New York & Erie R. Co.*, 26 Barb. 564:

"Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages. It will not, indeed, make this allowance upon a calculation of speculative profits, for this would be proceeding upon contingencies, and would involve the subject in too much uncertainty. It would be too difficult for practical application. Nor will the law indemnify for remote or indirect losses. The loss must be the natu-

ral and proximate consequence of the act, and when this can be ascertained without uncertainty, the principle of compensation will be adopted."

The leading case on that point is *Hadley v. Baxendale*, 9 Exch. 849. In this case the shaft of a mill having broken, the same was sent off by defendant, a common carrier, as a pattern for a new one. The carrier was informed at the time that the mill was stopped in consequence of the accident, and that work could not be resumed until a new shaft was obtained. There was an unreasonable delay, however, in transporting the old shaft, in consequence of which the new shaft was delayed. Plaintiff, in an action against the carrier, sought to recover the loss of profits occasioned thereby, but his claim was disallowed. The following is the language of the court:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them."

This may be considered as a very fair and full statement of the principles involved. American cases lay down substantially the same rule.

In *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 46 Miss. 458, the court declared it impossible to lay down any fixed rule for assessing the damages in those cases, but enunciated the following important principles:

1. The proximate and natural consequences of the breach must be always considered.
2. Such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time the contract was entered into may be considered.
3. Damages which may fairly be supposed not to have been the necessary and natural sequence of the breach cannot be recovered, unless, by the terms of the agreement, or by express notice, they are brought within the expectation of the parties.
4. Loss of profits in business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the carrier must have notice, either from the nature of the contract itself, or by explanation of the circumstances, at the time the contract was made, that such damages would ensue from non-performance.
5. If the contract is made with reference to embarking in a new business, the speculative profits therein which may be supposed to have been defeated by the breach cannot be recovered.
6. Where the articles in question is to be applied to a particular use, and this is known to the carrier, he is liable for all damages fairly attributable to the delay.
7. The party injured must not remain supine, but must take such steps to reduce his loss as lie in his power.

From the cases above referred to, and from those to be cited, certain general principles may be inferred.

Effect of Notice of Special Circumstances.—Where a carrier is notified, either expressly by the nature of the articles, or by custom of any special circumstances which make delay or loss of particular moment to the consignee, he is liable to respond in damages for all injury which he might reasonably have foreseen would occur; but unless such notice is given, he is not liable further than is indicated above.

Illinois Central R. Co. v. Cobb et al., 64 Ill. 128; Vicksburg & M. R. R. Co. v. Ragsdale, 46 Miss. 458; Geo v. Lancashire & Yorkshire R. Co., 6 H. & N. 211; Toledo, W. & W. R. Co. v. Lockhart, 71 Ill. 627; King v. Woodbridge, 84 Vt. 565; Chicago, B. & Q. R. R. Co. v. Hale, 83 Ill. 360; Great Western R. Co. v. Redmayne, L. R., 1 C. P. 329.

Where a saw-mill is delayed in transportation, the expense of idle hands and the loss of profits from contracts actually on hand is recoverable. The carrier might, from the nature of the article, have foreseen the loss. Vicksburg & M. R. R. Co. v. Ragsdale, 46 Miss. 458; and so where the delay was occasioned in carrying live-stock to market, where the carrier had contracted to deliver them on a certain day, which was market-day, it was held that the said carrier was liable for the expenses of keeping the cattle till the next market-day. Toledo, W. & W. R. Co. v. Lockhart, 71 Ill. 627; King v. Woodbridge, 84 Vt. 565.

In Priestly v. Northern I. & C. R. Co., 26 Ill. 205, certain machinery was unduly delayed, and suit was brought against the carrier. The court, in its opinion, says:

"Had the plaintiffs notified the defendants for what purpose they designed the machinery and the circumstances of their necessities, they might have brought forward other topics and elements of damage, such as they attempted to show on the trial—that a large number of hands were of necessity under pay and idle, loss of promised custom out of which profits would have been made. In the absence of notice proof of this kind was properly rejected."

And where the carrier knew that certain corn entrusted to its care was to be sold to the Government at a certain price, it was held liable, having lost the corn, for the amount which the Government would have paid. Illinois Central R. Co. v. Cobb et al., 64 Ill. 128.

But the notice will not be construed to extend the carrier's liability any further than it may be inferred from its terms to have informed the carrier of the probable results of failure on his part punctually to fulfil his contract. Home v. Midland R. Co., L. R., 8 C. P. 181.

Business Profits—Existing Contracts.—The loss of mere speculative profits in consequence of the delay of the carrier, or his failure to deliver the goods, is not an element of damage. The recovery is limited to compensation for loss of profits on existing contracts. Chicago, B. & Q. R. Co. v. Hale, 83 Ill. 360; Frazer v. Smith, 64 Ill. 128; Priestly v. Northern Ind. & C. R. Co., 26 Ill. 205; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458. Where, therefore, in an action for an injury to a jack, plaintiff endeavored to include in his damages the amount of profits he might have recovered from letting the animal out to serve mares, it was held that, there being no evidence that plaintiff had made contracts to that effect, or notified the defendant thereof, his damages must be confined to the value of the jack. On the other hand, where there was unreasonable delay in transporting a saw-mill, the plaintiff was held entitled to recover for loss on contracts actually entered into and on hand pending the delay. Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458.

Consequential and Remote Damages.—In some cases the damages sought to be recovered are so evidently consequential that there is no room for question. A consignee cannot recover for his loss of time in waiting for delayed goods. Ingledew v. Northern R. Co., 7 Gray, 86. Nor for his hotel expenses

during the same period. *Woodger v. Great Western R. Co.*, L. R., 2 C. P. 318.

In *Pennsylvania R. R. Co. v. Titusville Plank Road Co.*, 71 Pa. St. 350, the railroad company undertook to carry certain planks from one station to another, which were to be used in making a plank road. They were not carried according to agreement, and the consignee was allowed to recover the difference between the prices of plank at the two stations. The court held, however, that it was error to instruct the jury that plaintiff was entitled, in addition, to recover the increased expense of putting down the plank-road consequent upon the non-delivery. As to this point Sharswood, J., remarked:

"To say that the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carriers seems to be entirely too indefinite. It would include a rise of wages, stormy weather, bad roads in consequence, which would have been entirely beyond what would naturally have been within the view of the parties, and might well have happened even had the railroad company punctually performed its duty. The natural consequences of delay and stoppage of work and payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been, for the rule."

Executory Contracts.—In an action against a carrier for breach of an executory contract to carry goods, the measure of damages is the difference between the market value of the goods at the intended points of shipment and delivery, less the freight. The fact that the owner of the goods informed the carrier at the time of making the contract that he did so because he wished to make contracts with third persons for the sale of the goods to them, does not entitle him to recover of the carrier the profits which he would have made out of such contracts but for the breach of the contract of carriage.

Harvey v. Connecticut & P. R. Co., 124 Mass. 421.

HERRIMAN

v.

BURLINGTON, CEDAR RAPIDS & NORTHERN RY.

(57 Iowa Reports, 187.)

An action under chapter 68, Acts Fifteenth General Assembly, for five times the amount paid as freight, in case of an overcharge, is an action for a statutory penalty, and, under section 2529, Code, is barred in two years.

APPEAL from Fayette circuit Court.

The plaintiff avers that in February and March, 1879, he shipped from West Union to Pottsville, Iowa, certain grain, seed and pork over the defendant's road; that the defendant demanded of him, and received as freight for such shipment, \$265.50 more than was allowed by law; that the defendant did so in violation of law, to the damage of the plaintiff in five times the amount of the overcharge, to-wit, the sum of \$1,327.50 for which he asks judgment.

The defendant demurred to the petition on the ground that it showed that the recovery sought was for a statute penalty, and that the cause of action having accrued, if at all, more than two years prior to the commencement of the action, is barred by the statute of limitations. The court sustained the demurrer, and the plaintiff standing by his petition, judgment was rendered for the defendant. The plaintiff appeals.

Rickel, West & Eastman and D. W. Clements for appellant.
J. & S. K. Tracy, for appellees.

ADAMS, C. J.—Action to recover a statute penalty must be brought within two years from the time the cause of action accrued. Code, § 2529. If the recovery sought in this case is for a statute penalty, the action is barred. Whether the recovery sought is for a statute penalty is the question in the case. The amount claimed, which is precisely five times the alleged overcharge, would seem to indicate that the action was brought under charter 68 of the Laws of the Fifteenth General Assembly. We could not say absolutely from the petition that it was, but the counsel upon both sides have so treated the action in their arguments and we think that we ought to assume that it should be so treated by us. That statute fixed certain maximum rates of charges for transportation of freight, and provided that a violation of the act by demanding more than the maximum rates should be deemed a misdemeanor, to be punished by a penalty of forfeiture of \$500 to the school fund. It also provided that for a violation of the act, the company should “forfeit and pay to the person injured five times the compensation or charges illegally taken or demanded, or five times the amount of damages caused, as the case may be,” etc.

The plaintiff insists that notwithstanding the use of the word “forfeit,” the action is to be regarded as brought for indemnity, and that the provision allowing the recovery of five times the amount of the overcharge, was designed merely to fix the measure of the plaintiff's indemnity. He relies on *Koons v. C. & N. W. R. Co.* 23 Iowa, 493. That action was brought under the statute allowing double damages for the stock injured where a notice has been given, etc. The action not having been brought within two years from the time the cause of action accrued, the defendant claimed that the action was barred. The question presented was as to whether the recovery sought was for a statute penalty, and it was held that it was not. It appears to us, however, that there is a marked distinction between the statute under which that action was brought and the statute under which this is brought. In that case the court said: “This law does not give to the injured or aggrieved party a fixed statutory recompense for the wrong, but, without speaking of forfeiture or penalty, gives damages to the extent of the injury, and, in action brought, double that amount for

the neglect or refusal to pay after due notice." The court further said: "It is well to remember that the amount of injury in these cases is usually not large, and that the expense of litigation is frequently as great as the value of the property destroyed. The purpose of the statute was compensation to the owner rather than the punishment of the company. If a case arises entitling a party to relief, simple, actual compensation is all that the company is required to make if it shall comply with the owner's demand. If it resists, however, his claim after due notice, and he shall be compelled to resort to the court, then his compensation is to be double this amount." We have quoted somewhat fully in order to set forth the principles upon which the decision was deemed to rest. It will be seen that the fact that neither the word forfeiture nor penalty was used was deemed significant. The statute under which the present action is brought expressly provides that the company shall pay the amount recoverable as a forfeiture. Again, the double damages for injury to stock are allowed by reason of the neglect to pay single damages. The design is, as the court thought in the case cited, to stimulate the company to the payment of the single damages without delay or litigation. The forfeiture under the statute in question take place immediately upon the overcharge being made, and because a misdemeanor has thereby been committed. No offer to refund the amount of the overcharge would prevent the enforcement of the forfeiture. This to our mind shows very clearly that the essential object of the provision was not to afford the aggrieved individual an adequate remedy, but to protect the public by deterring railroad companies from committing the misdemeanor which a violation of the act was declared to be. The provision then is essentially criminal rather than remedial. This is sufficient to enable us to determine what statute of limitations applies. We might concede that the provision has a remedial element in it, but that would not change the case if such is not the essential element.

But it is urged by the plaintiff that if the provision is to be regarded as criminal, then an action in the name of the State to enforce the forfeiture provided in behalf of the school fund, should be held to be a bar to an action to enforce the forfeiture provided in behalf of the aggrieved individual.

But where the statute imposes two distinct penalties for the same act, as in this case, and the penalties are not alternative, the enforcement of one should not, we think, prevent the enforcement of the other. In our opinion the demurrer was properly sustained. Affirmed.

SUPPLEMENTAL OPINION.

ADAMS, CH. J.—A petition for a rehearing having been filed, we have re-examined the case in the light of it, and have to say

that while many considerations of no little weight are urged in favor of a reversal, we feel reasonably satisfied with the conclusion reached, and think that the petition must be overruled. We deem it proper, however, to add a few words to what we have already said:

In holding that the recovery sought is for a statute penalty we do not claim that the ruling can be supported by reasoning, having the force of a mathematical demonstration. The recovery given, is given to the aggrieved party, and was doubtless designed to cover the damaged sustained by him, and bar any other recovery. Looking at the provision in this aspect simply, it would seem to be remedial. And while the word forfeit is used, it has been held that the use of such word does not prevent the recovery from being regarded simply as a remedy. *Stockwell v. United States*, 13 Wall., 531. Yet we think that it cannot be denied that the essential idea of forfeiture is a loss of property inflicted by way of punishment. See *Bouvier's Law Dictionary*, and cases cited. In confirmation of this view we showed that this court in *Koons v. C. & N.W. R. Co.*, had deemed the absence of the word forfeiture significant as indicating that punishment was intended; and so we thought that the same court should deem the presence of the word significant as indicating that punishment was intended. Because one legislative body has departed in the use of the word from its strict meaning, and used it without intending punishment, it does not follow that our legislature made the same departure. We cannot hold that it did, unless the whole provision taken together would so indicate. Now, when we come to look into the statute, we find the recovery given a very extraordinary one, if regarded as intended to be mere compensation. Double damages, as in *Koon v. Railroad Co.*, may well enough be held to be intended as mere compensation, but it does not follow that quintuple damages could be so held with the same propriety. We do not say that the size of the multiple is to be urged as conclusive. Probably it should not. The most that we can say is, that taking the provision altogether we cannot divest our minds of the conviction that something more than compensation was intended—something by way of punishment to secure compliance with the law. If we are correct, then the plaintiff is seeking to recover something as a statute penalty, and he should, we think, have brought his action within the shorter period of limitation.

At this point we are met with the proposition that while it may be true that so much of the plaintiff's claim as embraces a statute penalty may be barred, yet the whole is not barred, and, therefore, the demurrer was improperly sustained. To this we think that it may be said that the claim must be regarded as a unit, and we cannot apply one provision of the statute of limitations to one part of it and another provision to another part.

It is proposed in the following note to collect the chief authorities on the law of excessive freight charges and freight discriminations, and to give a brief account of the existing state of the law upon these topics.

A somewhat different view has been taken of the common law doctrines on this subject in England and the United States. In England the doctrines in vogue are thus set out by Blackburn, L.J., in *Great Western R. Co. v. Sutton*, L. R., 4 Eng. & Ir. App. 226:

"At common law a person holding himself out as a common carrier on goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

"But the fact that he charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis. All that the law required was that he should not charge any more than was reasonable. *Baxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 78; *Branley v. South Eastern R. Co.*, 12 C. B. (N. S.) 74.

"But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the Legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line impose on them restrictions beyond what the common law imposed on ordinary carriers."

Great Western R. Co. v. Sutton, L. R., 4 Eng. & Ir. App. 226.

The court then enumerates at length the various Acts of Parliament passed prohibiting unjust discriminations, and regulating the rate of freights and fares. The reader is referred to the following cases for the construction of these acts:

Parker v. Great Western R. Co., 7 M. & G. 258; *Same v. Same*, 11 C. B. 545; *Edwards v. Great Western R. Co.*, 11 C. B. 588; *Crouch v. Gt. Northern R. Co.*, 9 Exch. 556; S. C. 11 Ex. 742; *Piddington v. S. E. R. Co.*, 5 O. B. (N. S.) 111; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; *Baxendale v. Gt. Western R. Co.* 16 C. B. (N. S.) 187; *Branley v. S. E. R. Co.*, 12 C. B. (N. S.) 63; *Nicholson v. Gt. Western R. Co.*, 5 C. B. (N. S.) 366; *Ransome v. Gt. Eastern R. Co.*, 4 C. B. (N. S.) 135, 159 S. C. 27 L. G. (N. S.) C. P. 166; *Great Western R. Co. v. Sutton*, L. R., 4 Eng. & Ir. App. 226.

In the United States a totally different view is taken of the common law doctrines, and it seems to be held that discrimination of rates is illegal independent of statute.

In New Jersey it has been held that a contract based upon such discrimination is void. *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407. The court in this case said:

"It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation on receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and was due in an equal measure to each. Nothing can be clearer than that under the prevalence of

this principle, a common carrier could not agree to carry one man's goods in preference to those of another. . . . Recognizing this as a settled doctrine, I am not able to see how it is admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions."

In *New Hampshire* there is a decision of like effect. *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 480. The law there may be stated to be in country, independent of statute, that it is the duty of a carrier in the performance of his public duty, not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to any undue or unreasonable prejudice or disadvantage in respect of terms, facilities, or accommodations. If he does so, he is liable in an action on the case to the party injured.

In *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 809, the doctrine is thus stated: "Discriminations in the rate of freight charged by a railroad company to a shipper, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are contrary to public policy, and the party charged the greater rate is entitled to recover the excess paid by him."

See in further support of the doctrines above laid down the following cases:

Southern Express Co. v. St. Louis, etc. R. Co., 10 Fed. Rep. 210, 869; 3 Am. & Eng. R. Cas. 594; *Texas Express Co. v. Tex. & Pac. R. Co.*, 6 Fed. Rep. 426; *Southern Express Co. v. Memphis, etc., R. Co.*, 13 Cent. L. J. 68; *Sandford v. Railroad Co.*, 24 Pa. St. 348; *New Eng. Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 480.

It is clear on principle that a railroad company cannot unfairly discriminate in its own favor.

Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218. See also annotations to 3 Am. & Eng. Railroad Cas. 594. A railroad company cannot charge different rates for transporting grain to different warehouses in the same city.

Vincent v. Chicago & Alton R. Co., 49 Ill. 83.

Nor can it excuse itself for failure to deliver grain at one warehouse on the ground that it has bound itself by contract to deliver all the grain transported by it to some other warehouse. Such a contract is contrary to public policy.

Chicago & N. W. R. Co. v. People, 56 Ill. 365.

Where suit is brought to recover the amount of an overcharge for freight in excess of that demanded from other parties, the proper forum is a common law court. A bill in equity will not lie simply because several railroad companies are parties defendant and a proportional part of the excess paid has to be recovered from each of them.

Scott v. Erie Railway Co., 84 N. J. Eq. 354.

Where a shipper pays to a carrier freight in excess of the legal rate after the goods have been carried and delivered without objection or protest, he cannot maintain assumpsit to recover the overcharge.

Kenneth et al. v. S. C. R. Co., 15 S. C. 284.

Where, however, in such case, the overcharge is paid under protest, it may be recovered.

McGregor v. Erie Railway Co., 85 N. J. L. 89.

In almost all of the States statutes have been passed regulating the rate of freight and fares, and prohibiting unjust discriminations. It has been repeatedly determined that the Legislatures have a constitutional right to pass such statutes.

Blake v. Winona & St. Peter R. Co., 19 Minn. 418; *Beekman v. Saratoga & Schenectady R. Co.*, 3 Paige Ch. 45; *State v. Winona & St. Peter R. Co.*, 19 Minn. 434; *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa, 188, 211; Rail-

road Co. v. Fuller, 17 Wall. 560; Hudson County v. State, 4 Zab. 718; McGregor v. Erie R. Co., 6 Vroom, 89; Ruggles v. Illinois, 91 Ill. 257.

Such statutes may, moreover, be enforced by penalties. State v. Winona & St. Peter R. Co., 19 Minn. 484.

Their passage does not constitute any breach of the contract relation established between the State and the corporation by the granting of the charter.

Illinois Central R. Co. v. People, 95 Ill. 818.

A statute appointing commissioners to fix the compensation to be paid by one railroad company to another for the drawing of its cars over the road of the company first named does not infringe upon the right of the former company to regulate tolls on its road. Vt. & Mass. R. Co. v. Fitchburg R. Co., 9 Cush. 369. See Fitchburg R. Co. v. Gage, 12 Gray, 398.

A statute providing under a penalty that "no railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction" applies only to the transportation of freight by such corporation over its own line, and not over other railroads for which it charges and receives nothing except as collecting agent of the corporations owning such roads.

Commonwealth v. Worcester & Nashua R. Co., 124 Mass. 561.

Under the Iowa statute prohibiting the making of overcharges for freight, the person wronged may recover both the overcharge and the penalty. It seems, however, that if at the time of paying the freight the plaintiff knew that it was in excess of the legal rate, he cannot recover the overcharge. Fuller v. Chicago & N. W. R. Co., 81 Iowa, 187.

See further on this topic Camden & Amboy R. Co. v. Briggs, 1 Zab. (N. J.) 406; S. C., 2 Zab. (N. J.) 628; Fisher v. New York Central & Hudson River R. Co., 46 N. Y. 644; Johnson v. Hudson River R. Co., 49 N. Y. 455.

Post

v.

CHICAGO AND N. W. R. Co.

(*Advance Case, Nebraska, March 20, 1883.*)

A regulation of a railroad company providing for the sale of tickets at a reduced rate, upon condition that they be used only by the persons purchasing the same, is reasonable and proper, and a third party cannot, by purchasing such ticket, acquire the right to travel on the same. A party holding such ticket, who refused to pay his fare and was expelled from the cars, cannot recover damages therefor.

Where a non-transferable ticket contained a condition that "I failing to comply with this agreement, either of these companies may refuse to accept this ticket," *held*, that this did not give the conductor the right to take it up, but merely to refuse to receive it.

The measure of damages in such case would not exceed the value of a ticket of the same class between the points named.

ERROR from Douglas county.

Redick & Conell, for plaintiff.

E. Wakeley, for defendant.

MAXWELL, J.—On the seventh day of January, 1879, one John Tristas purchased a third-class ticket via the Central Pacific, Union Pacific, Chicago & Northwestern, Michigan Central, Canada Southern, and New York, Lake Erie & Western Railroads to Boston, the price paid being the sum of \$66. This ticket contained the following conditions:

"Checks to be detached by conductors only.

"No stop-over privileges will be given on this ticket.

"Baggage checked only to destination.

"In consideration of this ticket being sold at a reduced price from the regular, full, first-class rate, I, the undersigned, hereby agree that it not be good for passage after 'twenty' (20) days from (and including) the date indicated by the agent's punch marks in the margin, and that I will go through to place of destination by the proper train and its connecting trains; also that this ticket is not transferable, and shall become 'void' if not presented for passage on the trip for which sold, and that, I failing to comply with this agreement, either of the companies may refuse to accept this ticket or any coupons (checks) thereof, and demand the full regular fare, which I agree to pay.

[Signature]

"JOHN TRISTAS.

"Witness: H. P. STANSWOOD,

"F. H. GOODMAN.

General Passenger and Ticket Agent, C. P. R. R."

The price of a first-class ticket at that time, over the same route, is shown to have been the sum of \$140, but the proof fails to show the price of second-class tickets, or whether unlimited transferable third-class tickets were issued or not, and if so the price of the same. Tristas seems to have gone no further than Omaha, and there transferred his ticket to one Hobbie. Within 20 days from the date of issue Hobbie sold the ticket to the plaintiff for the sum of \$25, the price of a regular ticket of the same class being about \$30. The plaintiff commenced his journey over the defendant road, but at Denison, the conductor, in pursuance of directions from Council Bluffs, examined the ticket and inquired of the plaintiff if his name was Tristas.

The plaintiff, in answer to the inquiry, frankly stated his name, and that he was not the original party to whom the ticket was issued. The conductor then put the ticket in his pocket, and informed the plaintiff that he must pay fare or leave the train. The plaintiff demanded the return of his ticket, which being refused, and the conductor insisting that he should either pay fare or leave he left the train at that point. He then returned to Omaha and commenced this action. On the trial of the cause the jury returned a verdict for \$31.70, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The errors relied upon are that the court erred in giving certain

instructions, and in refusing those asked by the plaintiff. The instructions are as follows: "If you find from the testimony that the ticket in question in this case was a third-class or 'emigrant' ticket which had been sold at a reduced rate to a person in San Francisco other than the plaintiff, and said ticket was by its terms not transferable, and the purchaser thereof in San Francisco, in part consideration of such sale, at a reduced price, agreed that it should not be transferable; and you further find that the plaintiff purchased in Omaha from some person other than defendants, or their authorized agent, and offered and attempted to use it as entitling him to passage from Omaha to Chicago on the defendants' road, and refused to pay his fare on the defendants' road, and did not pay his fare, then the defendants were not under obligations to allow the plaintiff to ride upon such ticket, and upon such refusal to pay fare had a right to require the plaintiff to leave the train, and he can recover no damages based on the fact that he was so required to leave. (2) The taking up of the plaintiff's ticket, however, was a wrongful act on the part of the defendants, for which they are liable to plaintiff. (3) The measure of damage to which the plaintiff is entitled for the taking of such ticket would be the value thereof, which would not exceed the price of a third-class or emigrant passage from Omaha to Boston, with interest to the first day of this time."

Every railroad has a right to adopt rules and regulations for the management of its business, provided such rules are not unreasonable, are within the scope of the powers of the corporation, and are not in conflict with the laws of the State. *Elwood v. Bullock*, 6 Q. B. 383; *Navigation Co. v. Pilling*, 14 Mees. & W. 76; 1 Redf. Railw. 95. The question whether rules are reasonable or not is a mixed question of law and fact, and is to be determined by the jury under the instructions of the court. *Day v. Owen*, 5 Mich. 530; *Jencks v. Coleman*, 2 Sumn. 221; *Bass v. C. & N. W. R. Co.* 36 Wis. 450; *Thomp. Carr. Pass.* 335.

In *Day v. Owen* it is said: "The reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be adduced from other facts."

A regulation of a railroad company providing for cheaper rates of fare between certain points, provided the ticket is used alone by the person purchasing the same and within a certain number of days from the date of issue, is reasonable and proper. It gives the purchaser the benefit of lower rates, while the railroad companies, being advised of what tickets have been sold and their character, are enabled without inconvenience to provide the necessary means of transportation. The contract being that the ticket was to be used alone by Tristas, no one else could acquire the right by the

assignment of the same to be carried over the defendant's road. The plaintiff, therefore, having no right to use the ticket in question for the purpose of being carried to Chicago, is not entitled to recover damages because he was required to leave the train. There is no error, therefore, in the first instruction. There is no error in the second instruction. The terms of the contract are, "the companies may refuse to accept this ticket," not that the company shall have the right to take it up. Although the ticket gave no right to the plaintiff to travel on the defendant's road, still it was his, and, if in his possession, might be sufficient to enable him to recover the purchase money from the person selling him the ticket. But the measure of damages in such case in an action against the railroad company could not exceed the value of a first-class ticket from Omaha to Boston. The measure of damages was correctly stated in the third instruction. The instructions asked on behalf of the plaintiff were not applicable to the testimony and were properly refused.

The judgment must be affirmed.

HALL

v.

MEMPHIS & CHARLESTON R. Co.

(U. S. C. C., W. D. Tennessee. October 2, 1882.)

The plaintiff, on the facts stated and proven may, in Tennessee, recover whatever damages he may be entitled to, whether his action sounds in tort or ex contractu, all forms of action having been abolished by the Code.

A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination.

While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty, certainly where he is in the wrong, to submit without resistance, except in defense against impending bodily injury; and, right of wrong, necessary resistance will excuse the use of force and mitigate the damages for any injury received.

A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other

business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract.

A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place.

MOTION for New Trial.

The plaintiff, who is about 85 years of age, purchased tickets at reduced rates for himself, his wife, about 76 years of age, and his daughter and her child, from Town Creek, a station on defendant's road, to Memphis and return, upon which a limitation was printed. "Not good after 30 days." They were persons of the highest respectability. Going to Texas, they returned after the limitation expired, and the conductor refused to receive the tickets, demanding train fare. This being refused, they were ejected at the next station, as required by a regulation requiring the conductor to demand certain prescribed rates for passengers not holding tickets. The plaintiff insisted that he had purchased the tickets as unlimited tickets, and that the station agent had assured him that, notwithstanding the limitation, he could be carried on them at any time. This was denied by the agent, and there was great conflict of proof on the subject of what transpired at the time of the purchase. The plaintiff offered to pay the difference between the price of the tickets and the regular unlimited tickets, and between the price of the tickets and the train fare, which was refused. He then offered to pay this difference to Collierville, a station further on, where he had friends. This was refused, and he was advised by the conductor to pay train fare to that station. He told the conductor that he would only leave by force, and laying hold of the seat refused to leave it. The conductor forced him out of it, and led or dragged him from the train, and the others were conducted to the platform. There was no hotel there, but a small station-house, in which there was a room in which the parties passed the night, under circumstances of great discomfort. His wrist was somewhat strained, and his wife strained her ankle on the platform. There was much dispute as to the exact occurrences, the inadequacy of light furnished, and assistance to the platform; the plaintiff complaining that they were hurried off and left in the dark, to find their way as best they could, in unpleasantly damp and cool whether for people of their age, while the conductor insisted that he acted with all the courtesy and gentleness possible under the circumstances, and with more attention than usual in like cases, because of the age of the parties.

It was not disputed that the business was disagreeable to the

conductor, and that he was at much pains to persuade the plaintiff and other parties to pay the small sum demanded for fare to Collierville, at least, but that the plaintiff insisted on being put off with force unless his offers to pay only the difference between the price of the expired tickets and the train fare were complied with. The train fare to Collierville for the whole party was between three and four dollars. The plaintiff had ample means to pay train fare to either Collierville or Town Creek. The court directed a verdict for the defendant company, with a stipulation, however, to submit to a verdict for the extra fare paid by the plaintiff on the next day for tickets to his destination, if the court should conclude the company was liable for it. Subsequently a verdict was entered for the plaintiff according to the stipulation, and he moved for a new trial.

Wright & Folkes, for plaintiff.

Humes & Poston, for defendant.

HAMMOND, J. It was much argued at the trial and on this motion for a new trial whether, under this declaration, there could be any recovery *ex contractu* at all, and whether the action did not sound so entirely in damages that the plaintiff could not recover for any mere breach of the contract, irrespective of the question whether the plaintiff had been rightfully or wrongfully ejected from the train. The court was of opinion then, and now is, that this was an immaterial question, since, under our Code, abolishing all forms of action, a plaintiff may recover by a simple statement of the facts, be they what they may, if these facts entitle him to recover in any form. Tenn. Code, §§ 2746-2748, 2896, 2976; *Jerman v. Stewart*, 12 Fed. Rep. 266, 267; *Angus v. Dickinson*, Meigs, 459; 5 Am. Law Rev. 205, 225. The court, therefore, put the defendant under a stipulation to submit to a verdict for the price of the tickets, not because the ejection of the plaintiff was adjudged wrongful, but because the facts showed that the defendant had refused to carry out its contract, and had incurred whatever liability attached for that breach. A verdict and judgment were subsequently directed, under the stipulation, for the plaintiff for the amount he paid for the tickets, which settled the right to recover on the facts, but limited the measure of damages to the price of the tickets. This action of the court assumed that the jury would have found the much-disputed facts in regard to the contract in favor of the plaintiff, and proceeded on the theory that he was entitled to be carried on the expired tickets from Town Creek to Memphis and back, and that the defendant company was guilty of a breach of its contract and liable for refusing to carry him. The case was treated as if the plaintiff had paid the extra fare demanded, as he did the next day, when he purchased new tickets and proceeded on his journey, and then sued for a refusal to carry him on the original contract.

It is now argued that, this being so, the plaintiff was wrongfully ejected, and the case should have gone to the jury under proper instructions as to the measure of damages. If the defendant company were complaining and demanding a new trial, I should not refuse it; for, clearly, the fact whether it made any contract other than that expressed on the limited tickets was much disputed, and the jury might have found the verdict either way, and the action of the court was wrongful as to the defendant company in depriving it of a jury trial on that question. But the stipulation was put upon the defendant to compel it to submit to a verdict on that question against itself, and disembarass the case of all other considerations, except the one whether the plaintiff was entitled to recover for putting him off the train anything more than the price of the tickets. The proper direction would have been to find for the plaintiff the amount paid for the new tickets and interest, or not, in the discretion of the jury, instead of a direction to find for the defendant company. But I had not then fully made up my mind that the plaintiff was entitled to recover anything *ex contractu*, and sought to reserve that question by the stipulation. The real question in the case is one of the proper measure of damages. When the court directed a verdict for the defendant corporation, with the stipulation above mentioned, it determined that the price of the extra tickets was the proper measure of damages, and, taking the subsequent action of the court under the stipulation into view, the case stands in the attitude of a direction by the court, on all the facts, assuming conclusively in favor of the plaintiff that he had a contract entitling him to carriage, that the jury should find a verdict for the plaintiff for the price of the extra tickets, and he is entitled to a new trial if under any proper view of the facts or law he could have recovered more.

It is proper to remark that the court laid out of the case all questions of unnecessary force, for, on the plaintiff's own proof, and paying no attention to the conflict as to what was actually done, as appears by defendant's proof, he resisted the conductor, and not only provoked, but invited, force to eject him; no doubt under the mistaken view of the law, as he himself expressed it, that "he had a right to vindicate his constitutional and legal rights as a free American citizen;" that it was his duty to do so; and further, that resistance was necessary to secure his right of action against the company. He admits that much, and I do not doubt he felt that he was building up a more substantial claim for large damages by resistance. It is a common mistake, but where the conductor is acting lawfully, and doing what he has a right to do, the passenger must submit to his authority, and resistance is wholly unlawful. The courts will not, where a passenger is in the wrong, tolerate any nice discriminations about the force necessary to secure submission to the conductor's lawful authority and overcome the resist-

ance, unless it may be where the conductor departs from the exercise of lawful force, and beats, wounds, or maltreats the resisting passenger in the ill-temper of belligerency, and thereby becomes an aggressor on his own personal account. Even here it would be remembered that the conductor is likewise human; while he should do his duty without unnecessary violence, and in the best of temper, a resisting passenger cannot expect the courts to erect delicate scales on which to weigh with exact nicety the force used to overcome his resistance. The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All the passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights, certainly not to increase his damages. I have held in another case that even where the passenger is right and the conductor wrong, it is contributory negligence to resist him by engaging in an unnecessary trial of strength with superior force. Absolute submission may not be a duty where the conduct of the conductor is wrongful, and resistance does not preclude the right to recover all reasonable damages for the wrong done; but unreasonable resistance should be considered in mitigation of damages; resistance should not, at all events, be allowed to aggravate the damages. *Brown v. Memphis & C. R. Co.* 7 Fed. Rep. 51, 65.

I fully recognize the feeling of "a free American citizen" in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and the lives and property she carries. Better that he should suffer the wrong than to endanger or discomfort his fellow-passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injury. In this case, therefore, it not appearing that the conductor was guilty of any attempted violence in overcoming the resistance of the plaintiff, and that he was as considerate of his age and obstinacy as possible, taking all the plaintiff said to be true, I do not feel authorized on the proof to submit to the jury whether or not the plaintiff's resistance might not have been overcome with something less of force than the conductor used. The plaintiff said he did the best he could to retain his seat in the train by holding on and refusing to leave it.

The same considerations, growing out of the mistaken notion of

the plaintiff that he was only vindicating his rights, that to do this he must invite force, and his obstinacy in refusing to pay the additional fare demanded while he had abundance of money with him to do so, convinced me that he was intent on making a case against this railroad company by compelling the conductor to eject him or recognize his tickets, and induced me to withdraw all the circumstances connected with his ejection from the consideration of the jury in aggravation of damages. In my judgment passengers cannot be allowed to build up cases for damages. Admit that the company should have carried this plaintiff notwithstanding the expiration of the limited ticket, and notwithstanding the regulations forbidding the conductor to recognize a ticket after it had expired, and it does not follow that the plaintiff is entitled to recover damages for the injuries, real or imaginary, to his person or his feelings for his ejection from the train. He may be entitled to the damages for a breach of the contract, which he has, by the judgment, received; and if, by the delay or refusal to carry him, he had suffered in his business or been put to expense, these might have been added. But there was no proof of such damages in this case. It was claimed that damages should be awarded for indignity to these old people; for injury to them in their persons and feelings by putting them out in the night under circumstances of discomfort. The conductor should probably have carried these aged people, their daughter and child, to Collierville, some 15 miles further on, where they were willing to stop, and had ample time to adjust their trouble about the tickets. This, in consideration of their extreme age, and the great indulgence due to even the exactions, the whims and the obduracy sometimes found in extreme old age, and abundantly manifested by this—as the proof shows—very excellent gentleman. All the jury, no doubt, would have advised this, and all the learned counsel, particularly those of the defendant. But this is mere sentimentalism. The conductor was not bound to do it, nor to risk expulsion by doing it, and the conduct of the plaintiff was not of that character to incline him to it. Here was an aged gentleman with an aged wife, their daughter and her child, found upon a train with expired tickets, which the conductor was forbidden to receive. There was a dispute about the obligation of the company to receive them. The fact appeared on their face that the contract of the company had expired, and this was all the conductor knew, or could know of his own knowledge. All else about them he must take from the plaintiff.

The plaintiff's claim rested upon complicated transactions, understandings, inferences, and a contract, if you please, resting in parol, with two or more station agents, more than 100 miles away. How could the conductor act on such a contract? How could he take these expired tickets, and obey the rules of his company prescribed for his guidance? But here the plaintiff insisting unreasonably

that he should. Their negotiations came to the point that by paying less than five dollars the party would be carried to Colliersville, where they had friends and were willing to stop until the trouble could be arranged; and yet this obdurate passenger refused to pay it, with ample funds in hand, and insisted on a forcible ejection of himself and the aged wife, their daughter and her child. If wrongly demanded it could have been recovered back, with costs, and all damages satisfied. Why should he not have taken that course? It is not the case of a man with a clear right and a clean ticket entitled to ride on that trip and train wrongfully ejected, but of one with a dispute right, a ticket void on its face, and which required further attention from the passenger to make it available, as he was informed then and there by the conductor. Under such circumstances, to insist on the conductor taking his word about what he had been told by the station agents as to the capacity of the ticket to take him along after its plain terms had stamped it with uselessness, rather than pay the fare demanded, was his own folly; and this was the cause of his ejection and his damage, and it was not the proximate or remote result of a breach of the contract.

Here we are met with an argument that this was all for the jury and not the court. I think not. The court determines the measure of damages as a question of law, by fixing the principle by which the jury measures the quantity. Outside of that it is for the court to adjudicate on the facts as found by the jury, and in reaching my conclusions I assume all the plaintiff's case to be just as he himself makes it, and base my judgment solely on his proof. Numerous cases can be cited in opposition to these views, but none of them are from the supreme court, and I prefer to follow those that may be cited to support this judgment. The fact is that this class of cases is not satisfactory as furnishing precedents for any judgment. The facts are so differential, the oscillation and vacillation so great, that any hope of reconciling the conflict is visionary. The most that can be done is to trace out some principle of judgment that meets the general approval. That which I seek to follow here is this: While the law holds carriers to a rigid responsibility to the public, and will enforce it by awarding damages, sometimes more than have been actually sustained, it does not require of them unreasonable acquiescence in every demand made by a customer to waive their ordinary business rules of conduct in favor of his convenience or even in favor of his contract. I tried to illustrate this at the trial by putting the case of a passenger being furnished through accident or mistake with a ticket to another place than that to which he wished to go. He has paid his money and there is a valid contract to carry him to his destination, but it can hardly be that he can require the conductor to stop the train till he can rectify the mistake, or take the ticket on his assurance of the real

contract, or to abandon the ticket system and disregard the regulations made for the general public and the carrier's mutual convenience. What is to be done? Clearly, it seems to me, the passenger should pay his fare—if able—and settle the difference with the company by returning the ticket and adjusting the balance. Men do this in ordinary business intercourse in other branches of trade or commerce, and there is no reason why they should not in this.

The law recognizes that these carriers find it necessary in their business to have their checks and balances in the intercommunication of their agents, and they require in its conduct elaborate systems of rules to prevent loss to them and to the public. Mistakes will occur with railroads as with others, and the same rules should be applied. It seems to me that a passenger, finding himself without a ticket or other evidence of his contract which will be recognized under these regulations, cannot plant himself on his contract right and force the railroad, outside and against the regulations, to a specific performance then and there by compelling the conductor to eject him as a foundation for more damages than he would receive if he should comply with the regulations, and sue for a breach of the contract. There is no other just way to manage these mistakes. Those who would defraud the company might pretend to be the victims of mistakes or the beneficiaries of contracts outside the regulations. We took much time, examined many witnesses, and heard much argument on the issue whether the station agent did or did not make the alleged contract to carry the plaintiff on tickets expired on their face, and I doubt if, in the conflict of proof, the jury could have reached a satisfactory verdict on that issue. How, then, could the conductor have tried it successfully in the brief time allowed him in collecting tickets? It was impossible. He had either to take the plaintiff's word for it or enforce his regulations. The plaintiff's word was, and has been all along, disputed; and, giving him the benefit of all the credence his character and life entitles him to, the fact remains that the conductor had no means of knowing the weight to be attached to his word, and a common impostor could have told the story as well as the best of men.

It is in my judgment the duty of a passenger to see to it, before he takes a train, that his ticket will carry him on that train, and where it is on its face expired he should have it renewed or otherwise made good at the proper place, and by inquiry before taking the train be sure that it is a proper thing for him to take that train. The business could not be done with tickets on any other principle. Admit all that may be demanded by a theory that it is the duty of the carrier to inform its agents of anomalous contracts and the result is the same. They do this by giving the passenger evidences of his contract, called tickets, or sometimes special passes, and it is likewise the duty of the passenger to see that he has these neces-

ary tokens of his right to travel on a train. If there be mutual mistakes and mutual neglect, or even a mistake by the carrier alone, it does not follow that the passenger can demand that all the regulations shall be set aside to cure the mistake, but only that it must be by conference with the proper officers (and the conductor on a moving train is not in a case like this one of these) adjusted, and if this be refused, proper damages may be recovered. But the proper damages are not such as the unfortunate passenger may receive by absolutely insisting on a violation of the ordinary regulations, by subordinate officials for whose guidance the regulations are a necessity, to cover a case clearly outside of them. If the plaintiff had been penniless, I need not say whether the principle would be changed. Perhaps not. But here there was money sufficient to have paid the extra fare, as it was afterwards paid, and the plaintiff's duty was to have paid it that night and sue for a breach of his alleged contract, and not to force an ejection and lay the foundation for larger damages than a suit on the contract would have given him. Suppose he had continuously refused to pay further fare and remained continuously at the place where was ejected, can it be said he could have recovered for all that delay in reaching his destination? Why, then, should he not pay at once and go on, as to pay later and go on, to avoid contributory negligence? It is argued that petty suits like that suggested by the court would be expensive and useless as a means of compelling great corporations to discharge their contracts, and the lawyers would not take them. Great corporations are no more liable for great damages for small injuries than other people, and the plaintiff, before a justice of the peace at his own home where the witnesses all resided, by an ordinary suit, could have recovered back all the extra fare, if he were entitled to it, with as little expense as in other cases.

Some argument has been made that the conductor demanded more fare than under the regulations he should have done. I think the regulations, as explained by the several conductors' books put in proof, and the explanations of the dates when they were in force, and the explanations as to the meaning of the terms "straight fare," "train rates," "conductors' rates," etc., as given by the witnesses, will show that this is not the fact. But I do not go into that, because the principle of this judgment is the same, whether the conductor demanded too much or not. A moving train is no place to wrangle with the conductor about rates. His demand for fare should be complied with, or the passenger peaceably and quietly leave the train and seek his remedy at law. He cannot compel ejection with force and increase his damages because the conductor asks too much. If he tenders the proper fare and it is refused, the law will compensate him in damages, but he cannot force himself on the conductor in a dispute about rates, any more than in a dispute about tickets. It is not like the class of cases

where the passenger is ejected for refusing to comply with unreasonable regulations in the matter of the manner and mode of carrying him, or like violation of the contract. There the public policy which requires carriers to respect the rights of people to accommodation according to contract, to protection to life and limb, etc., authorizes the courts and juries to enforce that policy by damages which are not altogether, perhaps,—at least where there is personal indignity or violence,—measured by the nicest scales of exact injury so much as by the force of example required to compel the carrier to do his duty to the public. *Railroad Co. v. Brown*, 17 Wall. 445; *Pennsylvania Co. v. Roy*, 101 U. S. 451; *Gallina v. Hot Springs R. Co.* 13 Fed. Rep. 116. These overcharges in rates for transportation can be compensated by the money overpaid and interest, and I do not see that the public policy referred to here requires that in the multitude of business a carrier shall be held never to make mistakes, or always to be exactly right in all disputes about contracts under the penalty of punitive damages. The argument that the case is governed by the strict law of contract which is so urgently pressed by general analogies of a contract to do a thing, and a neglect or refusal to do it, is met by the judgment in favor of the plaintiff for the full amount of the loss he sustained by the breach, and there is a misapplication of these analogies when we overlook the fact that the passenger makes his contract with reference to all the reasonable rules prescribed by the company for the useful conduct of its business, not only for its own convenience and profit, but also for that of the public as well.

A very vigorous protest is made by the argument against the doctrine of contributory negligence, as applicable to a case like this, but it is only at last a controversy about terms. Perhaps it is more technically correct to say that the conduct of the conductor of the train being unobjectionable, the injury complained of was not the direct result of any fault of his or the defendant corporation which he represented, and it is not, therefore, liable to the plaintiff, but it could have been prevented if the plaintiff had chosen to pay the fare demanded, and in that sense it was the result of his own negligence, rather than anything the conductor did.

It is further argued that the conductor put the plaintiff off at an improper place. It was a regular station, and his regulations required him to evict a passenger refusing to pay fare at the next station. There was no hotel at the place, but there were houses of citizens close by, and there was at the station a room, not very elegant to be sure, but all that the railroad could be required to furnish at such a place for waiting passengers. I know of no rule of law which requires a railroad company to furnish recalcitrant passengers with accommodations of any kind when put off the train for refusing to pay fare, or to put them off only at stations having

hotels. They might not be allowed to put them off between stations, where they cannot see agents or procure tickets without extraordinary trouble, or in a wilderness or a desert, to suffer by starvation or for want of lodgings, but this station afforded as much as the company could be required to provide in such cases.

On the whole case, it seems to me now, as at the trial, that the plaintiff's suit must be treated as if he had quietly left the train and sued for a breach of his alleged parol contract to be carried at the reduced rate of limited tickets after the limitation had expired, and that inasmuch as he shows no special damage to his business or otherwise, resulting from the delay, his recovery must be limited to the extra fare paid, the other injuries complained of being the cause of his mistaken notions about his right to be carried on the expired tickets, and his resistance to the proper demand of the conductor that he should, in the absence of any evidence of his contract, pay train fare.

As before remarked, there are cases which do not, in the text of the opinions and perhaps as adjudications, justify this judgment, but it finds support in others which seem to me more sound. Remarking that the case of *Louisville R. Co. v. Garrett*, 8 Lea, 438, does not, in my judgment, in the least contravene the views here expressed, and that the case of *Walker v. Langford*, 1 Sneed, 514, fully sustains them, although that was a contract of a wholly different nature, when it rules that a plaintiff cannot increase his damages for a breach of contract by neglecting, or refusing at his own expense, to do that which would lessen them, I close this opinion with a citation of the principal and most pertinent cases cited on either side, without attempting to review or reconcile them: *Frederick v. Marquette R. Co.* 37 Mich. 342; *Chicago R. Co. v. Griffin*, 68 Ill. 499; *Pullman Car Co. v. Reed*, 75 Ill. 125; Ill. Cent. R. Co. v. *Johnson*, 67 Ill. 312; *Cincinnati R. Co. v. Cole*, 29 Ohio St. 126; *Townsend v. N. Y. Cent. R. R.* 56 N. Y. 295; S. C. 4 Hun, 217; *Cox v. N. Y. Cent. R. R.* 4 Hun, 176, 182; *English v. Delaware & H. Canal Co.* 66 N. Y. 454; S. C. 4 Hun, 683; *O'Brien v. N. Y. Cent. R. Co.* 80 N. Y. 236; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Jackson v. Second Ave. R. Co.* 47 N. Y. 274; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Pittsburgh, etc., R. Co. v. Hennigh*, 39 Ind. 509; *Palmer v. Railroad*, 3 Rich. (N. S.) 580; *Maples v. N. Y., etc., R. Co.* 38 Conn. 557; *Burnham v. Grand Trunk R. R.* 63 Me. 298; *Thomp. Carr.* 337; *Hutch. Carr.* §§ 570, 575; 5 South. Law Rev. 770.

Motion overruled.

The principal case above reported raises an extremely important and interesting question relative to tickets issued with a condition on their face providing that they shall be of force for a limited time only. We propose to review the American decisions upon this point.

It seems at first to have been doubted whether it was competent for rail-

road companies to enter into a contract of such a character, whether a passenger purchasing a ticket was not properly entitled to avail himself thereof at any time in the future he might see fit. This question has finally been resolved in favor of the validity of the contract. *Barker v. Coffin*, 81 Barb. 556; *Johnson v. Concord Railroad Corp.* 46 N. H. 213; *Boice v. Hudson River R. R. Co.*, 61 Barb. 611; *Keeley v. Boston & Maine R. R. Co.*, 67 Me. 163; *Briggs v. Grand Trunk R. Co.*, 24 Upp. Can., Q. B. 510; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen, 287; *Hill v. Syracuse, B. & N. Y. R. R. Co.*, 63 N. Y. 101. At least if the ticket be sold in a fair and open manner, so that the purchaser has an opportunity of seeing exactly what the terms thereof are. *Shedd v. Troy & Boston R. R. Co.*, 40 Vt. 88. The grounds and reasons for this conclusion are fully stated in the opinion of the court in *Barker v. Coffin*, supra, thus:

"Had the railroads a right to make such a contract? Was the contract legal? I confess I am not able to see any reason why they had not a right to make such a contract, and why it was not legal. They were common carriers of passengers, and had a right to make any special contract not unreasonable and illegal. May not common carriers of passengers say, to-day or this week, we will carry you a passenger over our route for a sum specified, though to-morrow or next week our price may be double the sum which we will now accept? If this right is taken away from railroad companies or common carriers, what power will they have to protect themselves against overloading? It is claimed that, having once received the fare established at any given time for a passage from one place to another, the person paying the fare will be entitled to the passage at any future time, whatever may be the terms of the contract as to the time within which the passage should be made. Establish this as a principle, and the right of passage may be claimed by such numbers upon a particular day or occasion, as to render it impossible for the carrier to perform his contract. The contract for passage may be made at the time when the fare by the stage or cars is very low, and its execution be claimed at a future time when the reasonable fare is much higher, or the tickets may be purchased, as in this case, when competing roads have reduced temporarily the fare, and the passage may be claimed weeks or months after the fare has been greatly reduced. In short, I know of no reason why the carrier may not by agreement provide that the passage shall be made within a time specified, and in one continuous trip." *Barker v. Coffin*, 81 Barb. 556.

A passenger is not therefore entitled to ride by virtue of a ticket, the limitation of which has expired. If, upon demand for his fare, he refuses to pay, he may be expelled from the cars.

Hill v. Syracuse, B. & N. Y. R. R. Co., 63 N. Y. 101; *Elmore v. Sands*, 54 N. Y. 512; *Wentz v. Erie R. R. Co.*, 5 N. Y. Supreme Ct. 556; *S. C. 3 Hun. 241*; *Barker v. Coffin*, 81 Barb. 556; *Nelson v. Long Island R. R. Co.*, 7 Hun. 140.

This principle applies in cases of commutation tickets with coupons attached, where the time specified on their face within which they are valid has expired. *Powell v. Pittsburg, Cinn. & St. L. R. R. Co.*, 25 Ohio St. 70. It applies also in like case to mileage tickets, even though the number of miles for which they are issued has not been travelled. *Lilles v. St. Louis, Kansas City & N. R. Co.*, 64 Mo. 464.

So a company may issue return tickets, which can only be used within a limited time. *Farewell v. Grand Trunk R. Co.*, 15 Upp. Can., C. P. 427, or excursion tickets with a similar limitation. *State v. Campbell*, 37 N. J. L. 309.

And where a passenger, in return for a continuous ticket which he has delivered up, receives a conductor's check with the indorsement, "Good this day and train only," he is not entitled to stop off at a way station, and sub-

sequently claim to be carried on another day to his point of destination. *McClure v. Phila., W. & B. R. R. Co.*, 34 Md. 532.

In all the cases above mentioned the conductor is justified if the passenger declines to pay fare and relies on his expired ticket, to eject him from the train. The phrase "good this trip only" inserted into a ticket, does not limit the passenger to any specific day or train. It limits him only to a continuous passage, and may be used upon a day subsequent to that of its issue. *Pier v. Finch*, 24 Barb. 514.

Important questions often arise with regard to what constitutes a waiver of the provision limiting the time within which the ticket can be used. There is some diversity of opinion on this point. In *Boice v. Hudson River R. R. Co.*, 61 Barb. 611, it was held that, a mere conversation with the ticket agent subsequent to the purchase of the ticket, in the course of which the latter assured the buyer that the ticket could be used after the lapse of the time specified therein did not constitute a waiver. The agent, it was said, had presumptively no power thus to waive a provision of a contract already made; besides it was evident that such waiver was without consideration and nudum partum. A similar conclusion was reached in *McClure v. Phila., W. & B. R. R. Co.*, 34 Md. 532, already mentioned, where it was held that the ticket agent at a way station could not bind the company by a verbal assurance that a conductor's check limited so as to be good "that day and train only" was valid until taken up.

In *Nelson v. Long Island R. R. Co.*, 7 Hun. 140, it was intimated on the other hand that the company would be bound by the statements of the agent selling the ticket. It would seem in this connection that there is great force in the suggestion made in *Boice v. Hudson River R. R. Co.*, 61 Barb. 611, to the effect that the proviso on the ticket ought, in such case, to be erased by the agent, or at least that some mark should be made thereon by him to intimate to the conductor that there has been a special contract. Otherwise it would seem to us that the conclusion reached in the principal case in regard to damages must always obtain. Such is the doctrine laid down in *Boice v. Hudson River R. R. Co.*, 61 Barb. 611, *supra*.

"Any person of ordinary intelligence would know that a mere talk with a railroad ticket agent, to the effect that a ticket could be used or would be good, at a time when the face of it showed it would not be good and could not be used, without some rule or regulation of the railroad company authorizing conductors to receive such a ticket subsequent to its date, would not make the ticket good for a day subsequent to its date, when the price of such a ticket had been lawfully increased. It is probable that a statement of a ticket agent to any person that a ticket, like the one which the plaintiff had, would be good and taken at any time after its date, would be believed and would mislead the holder of it, and induce him to attempt to use it and ride by virtue of it, after its date. But when he should learn from the conductor on a train of cars on which he should attempt to ride by virtue of the ticket subsequent to its date, that it was not then good, he would not be justified in refusing to pay fare and to use force to remain on the train without paying fare."

The fact that the conductors of the company had in other instances accepted tickets which were expired does not constitute any evidence of usage to that effect where such conduct is not shown to have been known by the officers of the company. *Johnson v. Concord Railroad Corporation*, 46 N. H. 218; *Boice v. Hudson River R. R. Co.* 61 Barb. 611; *Dietrich v. Pennsylvania R. R. Co.* 71 Pa. St. 432; *Wakefield v. South Boston R. R. Co.* 117 Mass. 544.

Nor does the fact that the plaintiff himself has previously been allowed to ride on such expired tickets establish any right on his part to do so. *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82; *Hill v. Syracuse B. & N. Y. R. R. Co.* 63 N. Y. 101.

The use of a mileage ticket several times after it has expired and the acceptance of it by the conductor on all such occasions without objection gives the holder no right to be carried upon a subsequent occasion. *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45.

The checking of plaintiff's baggage by the baggageman upon production of an expired ticket and the punching of the same by such baggageman, does not entitle the holder to be transported by virtue thereof. *Wentz v. Erie R. R. Co.* 5 N. Y. Supreme Court, 556; 8 C. 3 Hun. 241.

An indorsement upon such a ticket by a conductor showing that it had been used to an intermediate station before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter with an indorsement showing it, is not such a waiver of the condition as allows a further use of the ticket. *Hill v. Syracuse B. & N. Y. R. R. Co.* 63 N. Y. 101.

Where a passenger produces an expired ticket, he cannot be ejected until he has been duly asked to pay his fare and has refused to do so. *Farewell v. Grand Trunk R. R. Co.* 15 Upp. Can. C. P. 427. Where a passenger has once been ejected for such cause, he cannot claim immediately to be readmitted on production of a regular ticket which he has kept in reserve. The conductor may justly infer that having once behaved improperly, he is likely to do so again and may therefore exclude him. *State v. Campbell*, 83 N. J. L. 309.

In ejecting a passenger from the cars the conductor is bound, even when he has a right to so eject him, to use no more force than is necessary for the purpose. If he uses more, he renders the company liable to an action. Where, however, the gist of the action is an alleged illegal removal and a legal justification is shown, the amount of force used is immaterial. *Johnson v. Concord Railroad Corporation*, 46 N. H. 213.

HOUSTON AND TEXAS CENTRAL R. R. Co.

v.

S. M. NICHOLS.

(*Advance Case, Texas. Austin Term, 1882.*)

In an action against a railroad company by a passenger upon one of its passenger trains for damages received by the plaintiff in an accident alleged to have been occasioned by the company's wanton disregard of its legal obligations, and by its gross negligence in running its train, and in permitting its bed and track to become grossly defective and unfit for use, wherein the plaintiff recovered \$2000 for actual damages and \$8000 for exemplary damages, the court trying the cause permitted the counsel for the plaintiff, in his closing argument, over the objection of the defendant, to read to the jury, as was read by plaintiff's counsel in the opening argument, the following quotation from Redfield on Carriers, coupled with the statement that the author was counsel for railway companies where he lived, viz.: "Section 539. The truth is, that common juries, with the highest instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession," etc.

Held, error sufficient to entitle defendant to a new trial.

APPEAL from Washington county.

Opinion by STAYTON, J. This suit was instituted July 14, 1873,

by the appellee, S. M. Nichols, against the appellant, the Houston and Texas Central Railway Company, to recover damages, alleged at \$30,500, for personal injuries received by the plaintiff while a passenger on defendant's train of cars, in an accident which occurred about May 1, 1873, whereby the passenger car in which plaintiff was riding was thrown from the track, and the plaintiff's collar-bone was broken, and he was other wise seriously injured; the plaintiff alleging that said injuries were caused by the wanton disregard of its legal obligations and gross negligence on the part of the defendant in and about the running of said train, and in permitting its road-bed, track, ties, and iron rails to become grossly defective, unsafe and unfit for use, and in allowing the same to remain in that condition for a long time, and until said accident occurred.

The case was tried at the fall term, 1875, and resulted in a verdict and judgment for plaintiff for \$10,000—\$2000 actual, and \$8000 exemplary damages—and from this judgment the defendant has appealed.

The jurisdictional question raised in this case is regarded as settled by the former decisions of this court. (*Bartee v. H. & T. O. R. R.*, 36 Texas, 648.)

Upon the trial of the cause, counsel for the appellee, in the closing argument to the jury, proposed to read to the jury from Redfield on Carriers, as will be hereafter set out; and before doing so, addressed the jury, in substance, as follows: "I will now read, to show you how juries ought to deal with this class of cases, what Judge Redfield, who I understand is the attorney for the railways in his own State, says in regard to the comparative ability of juries and courts to pass upon these questions," at which time counsel for appellant objected to the reading, on the ground that the passage offered to be read was not evidence, and not proper to be considered by the jury, and that if the doctrine enunciated in the passage was matter of law, it should be presented to the court and a charge asked thereon; but the court overruled the objection, on the statement of counsel for appellee, which was true, that his associate had read the same passage in the opening argument, and thereupon counsel for appellee read to the jury, and commented thereon, the following passage from Redfield on Carriers:

"Section 539. The truth is, that common juries, with the highest instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to have it objected, in our country, against the reason or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways; the companies are sure to be cast in the action, and this seems to be regarded as an unreasonable reproach. But, when we reflect how much more might be done in all such cases to

secure perfect safety and exemption from injury, and how much more really is done both in Great Britain and on the continent of Europe, we can only conclude that the common sense instincts of jurors have raised them to a higher plane of wisdom and justice than that which the courts, or the profession have yet attained." To which the defendant, by its counsel, excepted.

This is assigned as error, and was also made one of the grounds for a new trial.

While the courts are vested with a large discretion in regard to permitting counsel to read to juries from books, scientific, historical, or legal, for the purpose of illustrating an argument, yet such discretion is not unlimited, and is subject to revision, and when it clearly appears that such discretion has not been wisely exercised, but has been so used as to injure a party litigant, and to give a jury a false estimate of their duties or powers, it will be good ground for a reversal.

It would be hard to conceive of a passage more improper to read to a jury than the one above set out. By it they were given to understand that they were to try the cause, not according to the law as given to them by the court, and by the evidence, but by "the highest instincts of justice;" what that might be they were left to infer and determine from the "common sense instincts of jurors," which the author indicated had "raised them to a higher plane of wisdom and justice than that which the courts or the profession have yet attained." The law recognizes no such method of trial.

The ruling of the court by which the reading was permitted gave countenance to the sentiments expressed in the passage, and the jury, under such circumstances, might well conceive that it was as much the law of the case as was the charge of the court.

The fact that the passage was read twice, aggravates rather than alleviates the error.

The cases of *Wade v. DeWitt*, 20 Texas, 398; *Hines v. The State*, 3 Texas App., 483, and *Hudson v. The State*, 6 Texas App., 565, are cases in which exceptions were taken to the ruling of the court in refusing to permit counsel to read from books to the jury, and in them it was held, that as it did not appear that the court had abused its discretion, there was no error.

The right of counsel, in argument, to read to a jury any proper matter, should not be unreasonably restricted, for it is often necessary and highly essential to the clear and proper presentation of a case; but it is error to permit to be read the passage which was read in this cause.

When we take into consideration the many elements which juries are permitted to take into consideration in this character of cases for the determination of actual damages, involving as they do, expenses of cure, including medical bills, value of time lost during cure, fair compensation for physical and mental pain and suffering

caused by an injury, any permanent reduction of power to attend to business and earn money which may have resulted from an injury, it may well be questioned whether anything more than what is thus termed actual damages should be allowed, by way of exemplary damages, for the purpose of example or punishment of a party whose act did not directly inflict the injury if the injury is inflicted through the negligence of an employee, in whose selection the utmost care has been taken by the employer to get skillful, temperate and prudent servants, and to whom all proper and necessary materials have been furnished for the work which they are engaged to do; for there may be gross negligence, or, rather, a high degree of negligence, in the servant, when there is, in fact, no negligence, or only slight negligence, in the master. What is here said is intended only to apply to the liability of a master for exemplary damages for the negligence of a servant, and in no manner to the liability of the master for actual damages done to another through the negligence of a servant; for whatever negligence of a servant, in the course of a business in which he is employed, and within the line of his duty, may occur, by which another party, not a co-servant, is injured, is, by law, imputed to the master, and he is liable in actual damages therefor, without reference to whether the master willed or participated in the act or not, and without reference to the actual negligence of the master.

The evidence in this cause tends to show a high degree of negligence in the servants of the appellant. Whether the same was known to any person of such general powers as to make him the representative of the company, and therefore notice to him notice to the company of the defective condition of its track, does not appear in the record; nor is it necessary in this cause for us to speculate upon the sufficiency of the evidence of bad condition of the track to authorize a holding that by the exercise of proper care the defects must have been known.

The elements for the estimation of actual damage are not now, by the great current of authority, as they once were, confined to those things which can, with reasonable certainty, be measured by dollars and cents; but extend to compensation for not only physical, but also for mental pain and suffering, elements which formerly were made the basis for exemplary damages.

Actions for exemplary damages are quasi-criminal in character; yet, while for crime no man can be punished unless the penalty is fixed either absolutely, or by a minimum or maximum penalty, prescribed by law; still, in cases for exemplary damages there is no measure, save the discretion of the jury, except that which is found in the power of the court to set aside a verdict which appears to be the result of passion, prejudice, or some influence not found in the facts of the case.

This is a delicate duty, but one which courts must exercise in all proper cases.

Exemplary damages, when allowed, should bear proportion to the actual damages sustained. (*Mobile and Montgomery R. R. Co. v. Ashcraft*, 48 Ala., 33.)

In this cause the actual damages assessed by the jury was \$2,000, a sum probably not excessive under the facts of the case; but the exemplary damages were assessed at \$8,000, which to us seems so clearly excessive, when contrasted with the sum found for actual damages, and considered with reference to the facts of the case, that we are forced to the conclusion that it was the result of passion or prejudice, stimulated, perhaps, by the course pursued on the trial.

It surely is not true that for purposes of punishing one for negligence by which an injury has been inflicted upon another, to his actual damage \$2,000, it is necessary or proper to inflict upon the offending party an additional penalty of \$8,000. The court should have granted a new trial, upon the ground that the verdict was excessive.

There is no question made in this case as to the liability of the appellant for any actual damage sustained by the appellee by reason of the negligence of its servants in failing to keep its road in good repair.

The court instructed the jury, "If you further believe that it would have been possible for human foresight and skill to have provided against said accident and injuries, then you will find for the plaintiff such actual damages as the proof shows the plaintiff has sustained by reason of such injuries."

This is believed to state a higher degree of care than the law imposes upon a carrier of passengers, for there is no injury, unless the result of inevitable accident, which human foresight and skill might not possibly provide against. Such a rule would require "every possible precaution which ingenuity might suggest, or the skill of science afford," and would be impracticable in the every day affairs of life.

The rule as to care required of passenger carriers is believed to be correctly stated in *Railroad Company v. Halloran*, 53 Texas, 53. The charge, as given, could not, however, have prejudiced the appellant upon the question of liability for actual damage, for such liability was admitted in the court below, and in this court.

It is not believed to be necessary to consider the several questions raised as to the giving and refusing of instructions, for many of the same questions have been considered and decided in other causes by this court since the cause was tried, and will not probably arise in another trial of the case.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

H. AND T. O. R. R. Co.

v.

JULIUS BOEHM.

(Advance Case, Texas, 1882.)

A charge that would tend to limit a recovery for all injuries received to a recovery for only a part of the injuries made the basis of the claim, was properly refused, as it made the capacity for labor at the time of the injury the standard by which a life's labor was to be estimated.

There was no error in refusing to instruct the jury, "You cannot find any damages by way of compensation for the lessened capacity to labor for the period of plaintiff's life, there being no evidence to show what would purchase an annuity equal to the value of his labor for the duration of his life, and no basis has been furnished for making the calculation; and you will allow nothing, on this account, for permanent injuries, if any." There is no rule of law requiring the production of such testimony.

Where the suit was brought to recover only compensatory damages, the court having instructed the jury that they would find such actual damages as the evidence showed the plaintiff had sustained, and set out the several reasons, or grounds, for which damages might be found, none of these grounds being punitive in character; *held*, that the instruction that "You will allow only damages by way of compensation, and nothing for punishing the defendant," was properly refused.

Where the verdict is not clearly excessive it will not be molested, especially so after the judge who tried the cause overruled a motion for new trial, based, among other grounds, upon the excessive character of the verdict.

APPEAL from Robertson county. Beall & Kemp for appellant, Hamman & Adams for appellee.

STAYTON, J.—This action was brought to recover actual damages for injuries alleged to have been received by the appellee while a passenger on the appellant's cars.

The injuries alleged were painful, serious and permanent, and were charged to have been caused by the failure of appellant to keep its road in proper repair, by the negligent and unskilful management of its train, and by its negligence in permitting a "switch" at the place where the injury was received to become and remain out of order and in dangerous condition.

There was a trial, and judgment in favor of the appellee for \$5000.

There is no question raised in this court as to the matters of negligence under which it is claimed that the injury was received, and we will only consider such questions as are raised by the assignments of error, and as are relied upon in brief for appellant.

The first assignment of error relied upon is as follows:

"The court erred in refusing the **following** instructions asked by defendant:

"If the jury find for the plaintiff, you will consider whether, under the evidence, plaintiff's ability to labor was diminished by the injuries received. If you so find, you will allow the plaintiff an amount for compensation equal to the difference between what the plaintiff could earn before and what he can earn now, in consequence of said injuries, for the length of time said plaintiff was so prevented from work by said injuries. The above rule for estimating damages you will consider in connection with such damages as you may allow plaintiff for pain and suffering under foregoing charges."

In his petition plaintiff claimed compensatory damages for personal injuries, physical pain, mental anguish, serious impairment of health and permanent disability.

On the measure of damages, the court charged the jury as follows: "If you find for plaintiff, you will find such actual damages as the evidence shows he has sustained by the injuries and hurts proved to have been inflicted by the acts complained of on the part of defendant, and which were occasioned through their negligence, that is the value of the time lost by the plaintiff during the time he was incapacitated from work or labor (if any), taking into consideration the nature of his business, and the value of his services in conducting the same; also, a fair compensation for the physical and mental suffering you find the injuries caused, and the probable effect of the injury in the future upon his health, the length of time said plaintiff was so prevented from work by said injuries. The above rule for estimating damages you will consider in connection with such damages as you may allow plaintiff for pain and suffering under foregoing charges."

The instruction given by the court presented fairly to the jury the several elements or basis for damages set out in the pleadings, and to which the evidence related, and this would have been a sufficient reason for refusing the charge asked; but the charge was properly refused for the reason that it would have tended to limit the appellee's recovery for all injuries received to a recovery for only a part of the injuries made the basis of the claim; the impropriety of which is well illustrated by this case.

The charge, as asked, would have restricted the appellee's right to recover to such damages as would compensate him for pain and suffering, and for the "difference between what the plaintiff could earn before, and what he can earn now," and for loss of time. This would cut off all future increased disability resulting from the injuries received, although from such injuries, under the evidence, the appellee may, in the future, become unable to perform any labor, either physical or mental; it ignored the power in the future, but for the injuries received, to acquire a capacity, mentally or phys-

ically, to do more profitable labor than the appellee was able to do at the time of the injury; it made the capacity for labor at the time of the injury the standard by which a life's labor was to be estimated.

The next assignment of error presented is as follows:

"The court erred in refusing the following instruction asked by defendant:

"You cannot find any damages by way of compensating plaintiff for lessened capacity to labor for the period of his natural life, there being no evidence to show what would purchase an annuity equal to the value of his labor for the duration of his life, and no basis has been furnished for making the calculation, and you will allow nothing on this account for permanent injuries, if there are any."

There was no error in refusing to give this instruction; for there is no rule of law requiring the production of such testimony. If the appellant's counsel were of the opinion that such testimony would illustrate the question of damages, and give the jury a fair view of the question, they could have offered it, if admissible; as to which, under the facts of this case, we are not called upon to decide, and upon which we intimate no opinion.

The next assignment of error is, the court erred in refusing the following instruction asked by the defendant:

"You will allow only damages by way of compensation, and nothing for the purpose of punishing the defendant."

There was no error in refusing to give this instruction. The suit was brought to recover only compensatory damages; and in the charge herein first set out the court instructed the jury, if they found for the plaintiff, that they would find such actual damages as the evidence showed the plaintiff had sustained, and set out the several reasons, or grounds, for which damages might be found; and none of these grounds were punitive in character.

The last assignment of error is: "The court erred in refusing to grant defendant's motion for a new trial, because of the grounds therein specified, and because the jury exceeded the limits of compensation and found damages flagrantly outrageous and extravagant."

The damages assessed by the jury seem large, but the testimony tends to show that the injuries received are permanent in character—such as may not only impair the ability of the appellee to labor, but may at some future time render him unable to labor at all.

Dr. Eaves, witness for appellee, says he examined the injured man on the day of the accident; found an incised wound of the scalp two-by-two inches in extent, cut to the periosteum; the periosteum and scalp peeled off together; attended him six to eight days, and left him in a somewhat mentally deranged condition; is of opinion that the wound would render him less able to resist or re-

cover from other diseases in after life, and that he would be more liable to diseases, aches and pains than if he had not received the wounds; that as age came on the wounds would weaken his physical powers and increase his suffering; that, as a farm hand, he would be less able to do manual labor in the hot season, and that during his life, in any vocation, he would be liable, from his wounds, to mental and physical disease. He also testified that the injuries to the appellee were permanent.

Dr. Starley, witness for appellant, says he called to see appellee the day he was injured; found contusion and laceration of scalp, extensive on right side; also contusion of chest; that it was difficult to, and he could not, determine from the appearance of the wound whether it was permanent or temporary; that the skin on his head was lacerated, but skull not fractured; there was contusion on chest and some difficulty in breathing, but not serious, and only continued for a short time; that he discovered no wound on his right knee or left foot; attended the patient from February 21 to March 11, 1881; that when he left the patient he was not in a condition to work, but that he was not needing any medical attention.

The verdict is not so clearly excessive as to authorize us to substitute our judgment for that of the jury, and especially so after the judge who tried the cause overruled a motion for new trial, based, among other grounds, upon the excessive character of the verdict.

There being no error in the judgment, it is affirmed.

See note, p. 371.

H. AND T. C. R. R. Co.

v.

GEO. P. BURKE.

(*Advances Case, Texas. Austin Term, 1883.*)

The trial jury instructed the judge that "You may ascertain the value of plaintiff's services to himself before the injury and the value of his services since, and ascertain the difference, and then the jury would be authorized to give such a sum as would, at legal rate of interest, produce a sum equal, per annum, to that difference."

To be not maintainable upon principle, as thereunder plaintiff would not only receive full compensation, but, in addition would receive a donation.

APPEAL from the District Court of Washington county.

Sayles & Bassett, for appellant.

P. H. & J. T. Swearingen and Breedlove & Ewing, for appellee.

Appellee instituted this suit against appellant January 20, 1875, to recover damages for a personal injury, resulting, as claimed, from the negligence of the appellant. The injury occurred at

Chappel Hill, in Washington county, as appellee was getting off the train. The car ran over his arm at the elbow, and so crushed it that amputation became necessary, etc.

Appellant defended on the ground that the injury was the direct result of the negligence of appellee.

January 10, 1877, the case was tried, and resulted in a verdict and judgment for appellee for the sum of \$6000, from which this appeal was taken. The only error assigned deemed material in the disposition of this appeal is copied into the opinion.

WATTS, J.—Upon the trial, the court instructed the jury upon the measure of damages as follows:

“You may ascertain the value of plaintiff's services to himself before the injury and the value of his services since, and ascertain the difference, and then the jury would be authorized to give such a sum as would, at legal rate of interest, produce a sum equal per annum to that difference, and not a greater sum on this item.”

Appellant excepted generally to the entire charge as given, and assigned error as follows:

“6. The court erred in its charge to the jury as to the mode of estimating the damages sustained by the plaintiff.”

Thus presenting the question as to the correctness of the charge as quoted above. That rule for the measure of damages announced by the court for the government of the jury is not maintainable upon principle.

Resulting from the application of that rule, appellant would not only be required to pay the annual difference between the value of appellee's services before and since the injury, but, in addition, a gross sum sufficient to produce that difference at the legal rate of interest. In other words, as to this item of damages, appellee would receive full compensation annually for his lessened ability to labor and attend to his business, resulting from the injury, and would, in addition, receive an amount sufficient to produce the annual difference at the legal rate of interest.

To illustrate the injustice of the rule, as applied in this case, suppose the jury, in making up their verdict of \$6000, estimated all the other items of damage at \$1000, and then estimated the difference between the value of appellee's services before and since the injury at \$400 per annum; to meet that amount they awarded to him \$5000, which, at the legal rate of interest, produces the \$400 per annum. Thus it will be seen that, by the application of that rule, appellee would annually receive the actual compensation for the injury, and at his death the \$5000 becomes part of his estate. Under the operation of that rule, appellant would not only be required to make full actual compensation, but, in addition, \$5000 as a donation.

As to what particular rule for the measure of damages should be

adopted in such cases, admits of some doubt, but certainly it should be that rule which would secure to the injured party compensation for the injury, and nothing more.

In the case of *H. and T. C. Railway Co. v. Crowser*, Texas Law Journal, vol. 4, No. 48, page 755, which was a case where death had resulted from the injury, the court, in discussing the rule for the measure of damages, said: "Perhaps the nearest measure of damages approximating this reasonable certainty would be such as would purchase an annuity, if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case reasonably accessible in evidence, and including the probable duration of life, as shown by the approved tables."

This rule for measuring damages thus suggested would, doubtless, if it could be practically applied, more nearly approach actual and just compensation for injuries sustained than any other yet devised. But we are not aware of any such thing as life annuities in the market of this country. True, they are bought and sold as other securities in some of the European markets, but it is apprehended that test could not be applied in the courts of this country, as great difficulty would be encountered in establishing the value of such annuities, when, in fact, they have no market value in this country.

Practically, no specific or definite rule of universal or even general application has yet been formulated.

That, however, which is the least liable to result in complication and confusion in its application, after all, is this: that from the facts and circumstances of each particular case, the jury should award to the party injured such sum as, in their judgment, would compensate him for the injuries sustained.

Other questions presented and urged have been settled in *H. and G. N. R. R. Co. v. Randall*, 50 Texas, 254, and other late cases, and need not be discussed.

We conclude that the judgment ought to be reversed and the cause remanded.

Report of Commissioners of Appeal examined, their report adopted, the judgment reversed and cause remanded.—Gould, C. J.

In connection with the cases above reported, it will be well to consider the general subject of the measure of damages in actions brought by passengers to recover compensation for injuries sustained by them in travelling upon railroads. The subject is necessarily difficult to treat, inasmuch as the cases depend to a great degree upon the individual facts of each. Some general principles have, however, been laid down which seem capable of statement and methodical arrangement. These we shall endeavor to present to our readers.

Past and Prospective Damages.—In these suits the plaintiff is entitled to recover not only for the loss or damage occasioned up to the time of bringing

suit, but also for all prospective damages which he may suffer thereafter. *Filer v. New York Central R. R. Co.*, 49 N. Y. 42; *Pittsburg, A. & M. R. R. Co. v. Donahue*, 70 Pa. St. 119; *Chicago v. Langlass*, 52 Ill. 256; *Weisenberg v. Appleton*, 26 Wis. 56; *Kansas Pac. R. R. Co. v. Pointer*, 9 Kans., 620; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H. 541; *Funk v. Schroyer*, 18 Ill. 416; *Klein v. Jewett*, 26 N. J. Eq. 474; *Memphis, etc., R. R. Co. v. Whitfield*, 44 Miss. 466; *Curtis v. Rochester, etc., R. R. Co.*, 18 N. Y. 534; *Matteson v. New York, etc., R. R. Co.*, 63 Barb. 864; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H. 451.

It is on this ground that the evidence of a physician is admissible to prove the condition of the plaintiff's health long after the injury in question was inflicted and even after suit brought. *Hopkins v. Atlantic, etc., R. R. Co.*, 38 N. H. 9; *Dale v. Brooklyn, etc., R. R. Co.*, 1 Hun, 146.

Duty of Person Injured.—It is clearly, however, the duty of a person injured not to voluntarily increase or aggregate the injury to himself so as to lay a foundation for further damages. *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Indianapolis, etc., R. R. Co. v. Birney*, 71 Ill. 391; *Hobbs v. London, etc., R. R. Co.*, L. R. 10 Q. B. 111; *Patten v. Chicago, etc., R. R. Co.*, 33 Wisc. 524.

Nor must he neglect to take ordinary care of his injury, and to employ a physician or surgeon where one is necessary. *Allendor v. Chicago, R. I. & P. R. R. Co.*, 37 Iowa, 264.

In regard to the various elements of damage which are to be taken into account, see *St. Louis, Iron Mt. & S. R. R. Co. v. Cantrell*, 8 Am. & Eng. R. R. Cas. 198. We shall here proceed to consider them somewhat more minutely.

Expenses Actually Incurred.—The plaintiff may, of course, recover the expenses actually incurred by him in consequence of his injury, such as doctors' fees and the cost of nursing and medicine. *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Indianapolis, etc., R. R. Co. v. Birney*, 71 Ill. 391.

Loss of Time.—This is also clearly an element of damage to be taken into account. *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339.

Inability to Attend to Business.—The actual diminution in the receipts of the plaintiff's business caused by his inability to give it full care and attention constitutes an item of damage, but prospective profits which the plaintiff might have made by entering upon an intended change of business are considered as speculative and too remote. *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Walker v. Erie R. R. Co.*, 63 Barb. 260; *McKinley v. Chicago, etc., R. R. Co.*, 44 Iowa, 814; *Kinney v. Crocker*, 18 Wisc. 74; *Masterton v. Mt. Vernon*, 58 N. Y. 391.

Permanent Injuries.—The plaintiff is at liberty to show that the injuries inflicted are incurable. *Pittsburg, etc., R. R. Co. v. Andrews*, 39 Md. 329; *Whalen v. St. Louis, etc., R. R. Co.*, 60 Mo. 623. And that they are permanent in their nature. *Matteson v. New York, etc., R. R. Co.*, 62 Barb. 864; *Pittsburg, etc., R. R. Co. v. Andrews*, 39 Md. 329. He may show for example that his mental faculties are permanently impaired. *Toledo, etc., R. R. Co. v. Baddeley*, 54 Ill. 19.

In these cases the damages are of course proportioned to the incurable and permanent nature of the injury, and life tables are admissible to show the plaintiff's expectancy of life. *McDonald v. Chicago, etc., R. R. Co.*, 26 Iowa, 124.

Bodily Pain.—The bodily pain actually suffered by the plaintiff is to be taken into account in estimating the damages. *Whalen v. St. Louis, etc., R. R. Co.*, 60 Mo. 623; *Ohio, etc., R. R. Co. v. Dickerson*, 59 Ind. 317; *Ransom v. New York, etc., R. R. Co.*, 15 N. Y. 415; *McKinley v. Chicago, etc., R.*

R. Co., 44 Iowa, 814; Morse v. Auburn, etc., R. R. Co., 10 Barb. 621; Penna. R. R. Co. v. Allen, 53 Pa. St. 276.

Mental Distress.—The mental distress caused by the physical pain endured should also be taken into account. Johnson v. Wells, 6 Nev. 224; Fairchild v. California Stage Co., 13 Cal. 599; Pittsburg, etc., R. R. Co. v. Andrews, 39 Md. 329; Memphis, etc., R. R. Co. v. Whitfield, 44 Miss. 466; Muldowney v. Illinois, etc., R. R. Co., 36 Iowa, 462.

Occupation, etc.—The occupation and rank of plaintiff in life are often to be considered in estimating damages, in order to determine the actual loss which he has sustained. Winters v. Hannibal, etc., R. R. Co., 30 Mo. 468; Laing v. Colder, 8 Pa. St. 479; Penna. R. R. Co. v. Books, 57 Pa. St. 339; Nebraska City v. Campbell, 2 Black, 590; Moore v. Central R. R. Co. of Iowa, 47 Iowa, 688; Ballou v. Farnum, 11 Allen, 78.

Wealth.—The wealth of the plaintiff cannot be taken into account. Caldwell v. Murphy, 1 Duer, 238; except where exemplary damages are to be awarded. New Orleans, etc., R. R. Co. v. Hunt, 36 Miss. 660.

Character.—The character of the plaintiff cannot be taken into account. Johnson v. Wells, Fargo & Co., 6 Nev. 224.

Family.—The number of the plaintiff's family, and the fact that they are dependent on him for support, cannot be taken into account. Pittsburg, Ft. Wayne & Chicago R. R. Co. v. Powers, 74 Ill. 341; Stockton v. Frey, 4 Gill (Md.), 406.

Defences.—The fact that plaintiff is an habitual drunkard is admissible in evidence on behalf of the defendant, as it goes to show a lack of earning power. Cleveland & P. R. R. Co. v. Sutherland, 19 Ohio St. 151. The mere fact that the plaintiff, though injured, continues to receive his salary from his employer, does not take away or diminish his right to damages. Ohio, etc., R. R. Co. v. Dickerson, 59 Ind. 317. Neither does the fact that he has in consequence of his injury received charitable aid. Norristown v. Moyer, 67 Pa. St. 355. Nor that he has received the amount of an accident insurance policy effected by him. Pittsburg, etc., R. R. Co. v. Thompson, 56 Ill. 138; Bradburn v. Great Western R. R. Co., L. R., 10 Exch. 1.

Corporations liable for Exemplary Damages.—In a proper case corporations are as liable for exemplary damages as individuals. Graham v. Pacific R. R. Co., 66 Mo. 536; Malerck v. Tower Grove, etc., R. Co., 57 Mo. 17; Atlantic, etc., R. R. Co. v. Dunn, 19 Ohio St. 162; Pittsburg, etc., R. R. Co. v. Slusson, 19 Ohio St. 157; Hagan v. Providence, etc., R. R. Co., 3 R. I. 88; Turner v. North Beach, etc., R. R. Co., 34 Cal. 594; Milwaukee, etc., R. R. Co. v. Finney, 10 Wisc. 388. As to cases where exemplary damages are admissible, see the following authorities: Schultz v. The Third Ave. R. R. Co., 46 N. Y. Sup. Ct. 211; Garrett v. Louisville, etc., R. R. Co., 3 Am. & Eng. R. R. Cas. 416; Texas, etc., R. R. Co. v. Casey, 52 Tex. 112; New Orleans, etc., R. R. Co. v. Hurst, 36 Miss. 660; Graham v. Pacific R. R. Co., 66 Mo. 536; Caldwell v. N. J. Steamboat Co., 47 N. Y. 482; Kentucky, etc., R. R. Co. v. Dills, 4 Bush. 593; Quigley v. Central Pacific R. R. Co., 11 Nev. 350; Pullman Palace Car Co. v. Reed, 75 Ill. 125; Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25; Paine v. Chicago, etc., R. R. Co., 45 Iowa, 569; Doss v. Missouri, etc., R. R. Co., 59 Mo. 27; Western Union Tel. Co. v. Eyser, 91 U. S. 495; Taylor v. Grand Trunk R. R. Co., 48 N. H. 304; Hopkins v. Atlantic, etc., R. R. Co., 36 N. H. 9; Chicago, etc., R. R. Co. v. Williams, 55 Ill. 185; Peck v. Neal, 8 McLenn. 22. The original rule seems to have been that wherever the carrier had been guilty of gross negligence which caused an injury he was liable for exemplary damages. The English authorities, however, intimate that the old distinction between ordinary negligence and gross negligence is without proper foundation. They therefore incline to disregard it. Wilson v. Brett, 11 M. & W. 113; Beal v. South Devon R. R. Co., 3 H. & C. 337; Grill v. General Iron Screw Collier Co., L. R., 1 C. P. 600. As a conse-

quence, the law in England may be considered to be that the carrier is liable for exemplary damages only where the injury in question has been caused by actual misconduct or wilful carelessness. Many of the above-cited authorities in this country are to a similar effect. Such was the conclusion reached by the Supreme Court of the United States in *Milwaukee & St. Paul R. R. Co. v. Ames et al.*, 91 U. S. 489. In that case the court below had instructed the jury according to the old law, but the Supreme Court said: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but after all it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train."

Excessive Damages.—Courts are as a rule averse to setting aside verdicts on the ground that the damages are excessive. It is only where it is plain that the verdict is unjust and that the jury has been prompted by passion or partiality that the court will interfere. *Union Pacific R. R. Co. v. Hand*, 7 Kans. 890; *Missouri, etc., R. R. Co. v. Weaver*, 16 Kans. 356; *Du Laurus v. St. Paul, etc., R. R. Co.*, 15 Minn. 49; *Georgia, etc., R. R. Co. v. McCurdy*, 45 Ga. 288; *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660; *New Orleans R. R. Co. v. Statham*, 43 Miss. 607; *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461; *Montgomery, etc., R. R. Co. v. Boring*, 51 Ga. 582; *Sawyer v. Hannibal, etc., R. R. Co.*, 37 Mo. 240; *Collins v. Albany, etc., R. R. Co.*, 12 Barb. 492; *Chicago, etc., R. R. Co. v. Pondrom*, 51 Ill. 833; *Chicago, etc., R. R. Co. v. Fillmore*, 57 Ill. 265.

DENVER, ETC., R. Co.

v.

ATCHISON, ETC., R. Co.

(*Advance Case, U. S. C. C., District of Colorado.*)

An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal.

Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void as against public policy.

WELLS, Smith & Macon, for plaintiff; Peck and Thatcher & Gast, for defendant.

HALLETT, J., delivered the opinion of the court:

The duty of common carriers to give equal service on equal terms and upon reasonable compensation to all who may apply to them to carry persons or property is as well established as any rule of the common law. As to railroads, it is expressed in sec. 6, art. xv. of the Constitution of this State, in the following language: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

As a rule of law it must carry with it all that is essential to its due observance and enforcement. It is good for what is fully expressed in it, and for all that may arise therefrom by necessary implication. Whatever is inconsistent with it, or with the purposes for which it was adopted, is against public policy, and cannot be upheld. It is a rule of conduct for carriers which is designed to give the public the largest use of public conveyances which may be consistent with the service, and one which leaves to carriers only such powers as are necessary to the business. Thus the carrier may charge for his services, because he cannot work without pay; but he is allowed only a reasonable price, such as will be fair compensation for his labor. He may exclude from his carriage explosive compounds which may be dangerous to other goods and the carriage itself. He may also exclude thieves and gamblers and other mischievous persons who may be travelling for an unlawful purpose. These and the like things for the good of the service the carrier may do, but in general he must have regard for the public interest in all that he does; for, as said by the Supreme Court, "He is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; *Munn v. Illinois*, 4 Otto, 130.

If, then, a common carrier can set no limits to the service in which he is engaged, except such as are inherent in it, the position of the defendant in this controversy is made plain. The defendant refuses to carry to or from Denver and points between Denver and Pueblo, except in connection with the Rio Grande road, not absolutely indeed, but for the price charged in connection with that road. To say to the public that the rate shall be less by the Rio Grande road than by any other line is, in effect, to say that the public shall use that road only. A very little difference in the tolls will prohibit traffic over other lines, and clearly enough such was

the effect in this case. It is admitted that the defendant refuses to carry in connection with complainant at the same rate of charges as with the Rio Grande Company, and that it charges for such carriage a much higher rate; for all practical purposes that course of proceeding amounts to a refusal to carry except in connection with the Rio Grande road.

In support of its refusal to deal with complainant as a connecting road defendant avers that it has entered into a contract with the Rio Grande Company for making a "through line," and doing "through business between the Missouri river and Denver, which is of great advantage to defendant, and which cannot be maintained except on the theory of exclusive dealing between the parties thereto. So understood, the contract is open to the objection that it gives no choice of route to travellers and shippers of goods, of which something will be said hereafter. The answer, however, gives no intimation as to the true character of the contract as it appears in evidence. It is an agreement between the Union Pacific Company of the first part, the defendants and its leased lines of the second part, and the Rio Grande Company of the third part, for a division of territory and traffic in Colorado and New Mexico. At the time it was made, March 22, 1880, these companies owned or controlled all the railroads in Colorado and the northern half of New Mexico, and they assume in this agreement to divide the country and allot to each of the parties its separate portion for the purpose of building new railroads. The parties are severally bound not to trespass on the territory of other parties as defined in the agreement, and each stipulates with the other that it will not "voluntarily connect with or take business from or give business to any railroad which may be hereafter constructed" in the territory of the other. And, settling the question of new roads, the parties proceed to a division of traffic in paragraphs four, five, and six of the contract, as follows:

Fourth. All traffic to and from the Missouri river, and all competitive local traffic, both passenger and freight, to and from the territory south and west of Denver, reached and covered by the Denver and Rio Grande Railway Company or the Denver, South Park and Pacific R. R. Co., and lines controlled or constructed or to be constructed by them or either of them, or promoted by and connecting with them or either of them, shall be pooled between the Union Pacific R. R. Co. and the Atchison, Topeka, and Santa Fe R. R. Co., one half to each, also all traffic to and from the Missouri river, and to and from competitive local points, both freight and passenger, to and from Denver, shall be divided three quarters to the Union Pacific Ry. Co., and one quarter to the Atchison, Topeka, and Santa Fe R. R. Co., each company in each case to deduct forty per cent as cost of operating, it being understood and agreed that all local business, both passenger and freight, to

and from the Denver, South Park and Pacific R. R. Co., east of and including Weston station, shall be treated as Denver business, and divided accordingly. It is also understood that the party of the third part is not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro.

Fifth. That as long as the parties of the second part, and each of them, shall keep the agreements on their behalf herein contained one half of all the traffic, both passenger and freight, originating in Colorado, and also in New Mexico at points as far south as the party of the third part is authorized to build under art. 2 of this agreement, or coming or delivered to the party of the third part for transportation over any of the lines of the party of the third part, constructed or to be constructed or promoted by it, or coming or delivered to it for transportation from lines connecting with it and destined for points east of the line between Denver and El Moro, and said line extended northerly and southerly, shall be delivered at South Pueblo for transportation over the railroads controlled by the parties of the second part, and the other half at Denver for transportation over the railroads controlled by the party of the first part, as far as the party of the third part can legally control such traffic. It is further agreed that as to all traffic, both freight and passenger, interchanged between the party of the third part and the other parties hereto, to and from Denver via South Pueblo, and from and to South Pueblo via Denver, the party of the third part shall be entitled to and shall pro rate with the other parties at the rate of one mile and a half to one; that is to say, shall be entitled to and shall share in the distribution of such total fare and freight moneys for each mile of actual haul done by the Denver and Rio Grande Railway Company, as if the same were carried by it one mile and a half; but the allowance of extra mileage shall in no event exceed local rates, and, in case of any more favorable pro rata being given to the party of the first part, the same shall be given to the party of the second part. It is further agreed that the rates between South Pueblo and Leadville, and between South Pueblo and all other points west of Pueblo, shall be as low as between the same points and Denver, under any and all circumstances, and the party of the third part shall not discriminate against the parties of the second part in respect of cars or other facilities for the transfer of freight and passengers.

Sixth. In order to enable the party of the third part to carry out its obligation under the above article and for its protection, it is further agreed that the parties of the second part shall, as long as the party of the third part shall keep the agreements on its behalf herein contained, deliver at South Pueblo, for transportation and traffic, passenger or freight, destined from points east of the said line of the party of the third part to points on its line

constructed or to be constructed or promoted by it, or connected with it, in Colorado, and also in New Mexico to points on its line as far south as the party of the third part is authorized to build under art. 2 of this agreement, and shall not deliver to, or cause the same to be transported over or voluntarily receive the same from any other line or railroad in the territory named than that of the party of the third part, so far as the said parties of the second part can legally control the same. And that any agreement or understanding of the parties of the first and second parts with each other, or of both, or either, or any of them, with any competing railroad for a division of business, or territory, or earnings that might divert business which would otherwise, under this agreement, pass over the lines of the party of the third part, shall provide for securing to the party of the third part a proportionate benefit on the mileage basis, stated in art. 5, for not less than one half of the southwestern and western business and one fourth of the Denver business, as provided in art. 4 of this agreement; provided that this shall not prevent the party of the second part from making any agreement or understanding with the Atlantic and Pacific Railroad Company without incurring any liability to the party of the first or third parts."

Of this remarkable document it will not be necessary to speak at length in this connection. To do so would perhaps convey an impression that for some purposes these corporations have the powers which in this instrument they have assumed to exercise. It is enough to say that it is a conspiracy to grasp commerce and suppress the building of railroads in two great States. Similar provisions have fallen under the condemnation of other courts, whose judgment of them has been clearly expressed. In *Hartford, etc., Co. v. New York, etc., Co.*, 3 Rob. (N. Y.) 411, it was held that a provision in a contract forbidding one of the parties to extend its road would avoid the contract. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 418, 349.

The Rio Grande Company also agrees, in this instrument, "not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro," an express renunciation of a duty enjoined by the State, and therefore void. If that company can decline a part or all of the carrying business at Trinidad, it may also abandon its entire line and refuse to serve the public in any way. *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 4 DeG. M. & G. 415; s. c., H. of L. Cases, 113; *State v. Hartford, etc., Co.*, 29 Conn. 538; *Union Pacific Co. v. Hall*, 1 Otto, 343.

A more objectionable feature of this instrument is that in which

the parties agree not to "connect with or take business from or give business to any railroad" which may be constructed in Colorado or New Mexico after its date. That is to say, these powerful corporations, having secured a monopoly of the carrying business in two States, will hold it indefinitely and refuse to recognize or deal with any rival that may enter the field. Argument is not necessary to show that a compact of this kind is against public policy and therefore void. Certain corporations of Pennsylvania controlling coal produced in a large district of country, made a combination to regulate the supply and the price, which was held to be illegal. *Morris Run Coal Co. v. Barclay Coal Co.*, 38 Penn. St. 173. In this instance the combination is to control the carrying trade of a great country which is of much greater importance to the people than coal.

It is believed, however, that the true principle mentioned at first should control without reference to any compact or agreement, valid or otherwise, that may have been made. The carrier service is subject only to conditions and limitations necessary to its existence, and not such as the carrier himself may impose from motives of gain or other purpose. If the defendant may elect to receive goods and passengers at Pueblo from the Rio Grande Company, and to deliver to that corporation alone, other conditions may be added, as that the goods shall be brought in wagons and the passengers on horseback. What right has the defendant to say that goods or passengers shall come to it in one way or the other? Or that goods and passengers carried by it shall be carried to other points beyond its terminus by one company only? The answer of defendant is that such arbitrary distinctions are profitable to it, and therefore lawful. Its first duty is to its stockholders, and anything that will bring anything to its exchequer is permissible. In the courts a different view of the subject prevails. *Twells v. Penn. R. Co.* is a case decided in the Supreme Court of Pennsylvania, for which the reporter of that court was probably unable to find space in the regular series of reports. The case may not be of interest to the corporations of that State. The opinion is, however, printed in 3 *Am. Law Reg. (N. S.)* 728, and as it is cited by the court in later cases it seems to be authentic. Defendant's road extended from Pittsburg to Philadelphia, and it had arranged with some other road to carry from Philadelphia to New York, so that it was able to carry through to the latter place from points on its own line. By raising the local rate between Pittsburg and Philadelphia defendant sought to compel shippers to patronize its through line. As the question is stated by the court, defendant said to plaintiff, "Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you for its carriage to Philadelphia six cents per hundred pounds

more than we demand from all others who employ us to transport similar freight only to Philadelphia, or, if you employ us to carry it to New York, after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation." And the court then adds, "No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, e.g., one of two other carriers. They cannot say to a shipper at Pittsburg of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A to New York, we will carry it over our line at certain rates. If you send it by any other than A our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties or the railroad company itself. Of transportation along the line of their road the defendants practically have a monopoly. It is not consistent with the public interests, or with common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road." The court cites *Baxendale v. Great Western R. Co.*, 1 *Neville & McNamara*, 191, which clearly supports the view expressed. That case is said to be reported in 5 C. B. (N. S.) 309, and other English books, as in *Neville and McNamara*.

So also a carrier cannot refuse to receive a passenger, on the ground that his coach connects with another which extends the line to another place, and he has agreed with the proprietors of such other coach that he will not receive passengers from such place unless they come in his coach. *Bennett v. Dutton*, 10 N. H. 481. On the same principle a railroad company cannot elect to deliver grain at one warehouse on the line of its road to the exclusion of other warehouses (*Chicago, etc., R. Co. v. People*, 56 Ill. 365), or to deal with one express company to the exclusion of other express companies. *Sanford v. P. R.*, 24 Pa. St. 378; *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188. These cases are sufficient to show the great weight of authority in support of the rule as stated, that a carrier cannot hamper or limit his duty to the public except in matters essential to the service.

The opposite view has secured recognition from some eminent judges, as in *Jenicks v. Coleman*, 2 Sumner, 221, but great names do not prevail against great principles, and should not be allowed to do so in this instance.

In all that has been said the right of the defendant to arrange

with the Rio Grande Company for a through line to Denver and elsewhere, and to carry its connection with that company, has not been impugned. We recognize the authority of railroad companies to unite in continuous lines for greater facilities in the transportation of passengers and freight, as established in numerous cases. In fact, the constitutional provision to which we shall presently refer seems to demand such union. But we maintain the right of travellers and shippers of goods to choose between rival lines of railroads without let or hindrance from the latter. We deny the power of a railroad company in the use of its own road, by discriminating charges or other arbitrary measures, to compel the public to resort to any other road, or adopt any particular course in the transmission of goods or passengers. This proposition stands with the general rule before mentioned, that carriers shall not limit or trammel with arbitrary distinctions the service to be rendered; that all roads shall be open to wholesome competition, as declared in the cases in the Fourth and Fifth Denio; and with the doctrine that the carrier shall follow the instructions of his patrons, to the extent of forfeiting his earnings in case of disobedience. *Robinson v. Baker*, 5 Cush. 137. We hold, therefore, that defendant is bound to give to complainant reasonable facilities for the exchange of passengers and freight at Pueblo as to all who desire to use complainant's line in connection with its own, and for the price of carriage charged to persons who use the Rio Grande road in connection with defendants. There is some difficulty in deciding what such facilities shall be. On demurrer to the bill we had occasion to consider the meaning of section 4, article 15, of the Constitution, which declares the right of every railroad to connect with any other railroad, and we arrived at the conclusion that the connection mentioned in the Constitution is of a business character involving the interchange of passengers and freight in the manner usual and customary between railroads throughout the country. Objection is now made that the clause referred to is authority to the legislature to pass laws on the subject, but otherwise incapable of enforcement. We have not maintained that the physical connection of tracks provided for could be made without a law to direct the course of proceeding. In this case it is conceded that the roads are united, and the question is whether any use shall be made of the connection. And we shall not attempt to point out the course of legislation or the limits to which it may extend under that section. Independently of legislative power and action, the clause conveys to us the idea that railroads in this State are to be operated in conjunction for the convenience of the public, at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other. What more may remain for the consideration and judgment of the legislative assembly we are not concerned to know.

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed or protected or the duty imposed may be enforced." Cooley's Con. Lim. 101.

Within this rule the section is obligatory on railroads to the extent indicated, if no further.

It is also objected that this construction of the section brings it into conflict with section 8, article 1 of the Constitution of the United States, which confers on Congress the power "to regulate commerce with foreign nations and among the several States." The clause referred to directs what shall be done within the State for the advantage of the people of the State. Whatever the effect may be on inter-State commerce until Congress shall act on the subject, such regulation is within the authority of the State. *Munn v. Illinois*, 4 Otto, 113; *Peik v. Chicago, etc., R. Co.*, *Ib.* 164.

Many witnesses in the service of prominent railway companies were examined as to the course of business between railway companies in the United States in forming continuous lines and sending freight and passengers over connecting roads. The greater number concur in the statement that such arrangements are the subject of special agreement, as to which the corporations interested claim and exercise the absolute authority of natural persons in the daily affairs of business. The evidence discloses what is fully known to all who have given any attention to the subject, that, as to business intercourse, railway companies assume to be absolutely independent of each other. In the strife of competition it is not strange that each should assume to have authority in all things—and yet they do not absolutely refuse to take passengers and freight from each other. In *Bennett v. Dutton*, 10 N. H., in 1837, when the carrying business was young, defendant refused to take plaintiff in his coach because the latter had been guilty of riding in a rival coach. But now the managers of railroads are too wise in the law to make such blunders. By discriminating charges, business may be sent in one way or another to avoid a rival line as well as by refusing to deliver to such line. An illustration—not given in the evidence, but within the knowledge of many persons in this community—may be recalled. Not many years ago the Union Pacific road and the Denver Pacific road were in the control of companies hostile to each other. They did not refuse absolutely to deliver freight and passengers to each other, but they could not agree in the rates to be charged by each company, and goods from California, consigned to Denver, were carried by Cheyenne to Omaha, 600 miles east of Denver, and then to Kansas City, 200 miles south, and back to Denver, 639 miles. This circuit of more than 1400 miles was made to avoid the use of the Denver Pacific road from Cheyenne to Denver, a distance of 110 miles, or something like that. If railway companies impose such onerous bur-

dens on the public, it must not be supposed that they have authority or law for it. Returning to the evidence, it sufficiently shows that passengers and freight are freely exchanged between the connecting railroads in most cases. This is the rule, and the exception arises when one of the parties conceives that it can make more money by some other course. Obstacles are then made to the continuance of friendly relations in the way of discriminating charges and the like, and the companies become hostile to each other. Now, the right of railroad companies to raise such obstacles, in their own interest, and against the public interest, is the very matter in issue in this cause. We have endeavored to show that they have no such right, and if we have succeeded, the practice itself is not now in the way of granting relief in this cause. If that has not been shown further discussion will not avail.

We perceive that there is a difficulty in setting up these companies to be agents, each for the other, in the sale of tickets for passage over both lines, and for making through contracts binding on both companies for the transportation of goods. But some things may be done without making either company an agent for the other, and without bringing the companies into any relation of contract or agreement as between them. Passengers and their baggage may be delivered at the junction of the roads by each company, to be transported by the other, and goods may be forwarded in car-load lots and otherwise on terms that will not involve any contract made by one of these companies for and on behalf of the other. The defendant accepting the services of other railroad companies in selling through tickets and making through contracts over its own line, in connection with the Rio Grande road, ought not to object to the same company's performing the same service for complainant if they are willing to do so; nor should defendant be heard to say that it will not carry goods or passengers on the ground that they are to be carried further by complainant from defendant's terminus to some other point. It is, however, unnecessary to discuss in detail the relief to be granted, as that can be well enough expressed in the decree. In this opinion we seek only to define the general rule.

The decree will be for the complainant, but not to the full extent of the prayer of the bill.

McCrary, circuit judge, concurs.

The principle of law upon which the above case was decided is a well-established one. Railroad companies must not in any way obstruct or hinder public traffic. The very object of their existence is to promote and facilitate such traffic; all contracts therefore which are in contravention of this object will be deemed void, and will not be enforced by the courts.

Railroad companies may, however, enter into contracts with each other relative to the transportation of freight, where such contracts are intended to advance bona fide the facilities for the transmission of goods, and not to raise the rates of freights or to constitute obstacles to traffic for their own

advantage. *Stewart v. Erie and Western Trans. Co.*, 17 Minn. 373; *Perkins v. P. S. and P. R. R. Co.*, 47 Me. 573; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; *Vermont and Canada Central R. R. Co. v. Vermont Central R. R. Co.*, 34 Vt. 1.

All contracts, on the contrary, intended or having a tendency to keep up the rates of freight, or to present obstacles to public traffic are void. An association, therefore, among the whole or a large part of the owners of boats on a certain canal to regulate the rates of freight, whereby it was provided that the profits should be divided in a stipulated manner, and that no members of the association should embark in any similar business, was held void and illegal. *Stanton v. Allen*, 5 Denio, 434, and compare *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173.

For the same reasons any contract which prevents the construction of a railway, and so prevents competition, is deemed contrary to public policy. A contract, therefore, entered into by the owners of a railroad with the owners of a rival line, whereby the former agree not to extend their road beyond a certain point, is void. *Hartford and N. H. R. R. Co. v. N. Y. and N. H. R. R. Co.*, 3 Rob. (N. Y.) 411.

In *State v. Hartford and New Haven R. R. Co.*, 29 Conn. 533, a railroad company was chartered to run its tracks to tide water in New Haven Harbor. It did so, and for a number of years thus made a connection with a steamboat company by which passengers and freight were transported to and from New York. Subsequently the said company discontinued the running of its trains to tide water, and built a new piece of track, running its trains so as to connect with another railroad company having its line to New York. The consideration of this contract was the prevention of a threatened extension of another road which would have competed with the first-named company on the one side, and on the other the advantage secured to the second company over the steamboats in the through traffic to New York. This contract was held clearly opposed to public policy, and a mandamus was accordingly awarded to oblige the first-named company to run its car to tide water.

In the case of *The Wiggins Ferry Co. v. Chicago and Alton R. R. Co.*, 73 Mo. 389, 5 Am. and Eng. R. R. Cas. 1, the facts were these: A railroad company, requiring a ferry at a certain point to complete the transportation of its freight and passengers, entered into a contract with a ferry company by which it bound itself to give all its ferrying business at that point to said company, and not to employ any other. The ferry company undertook to furnish and maintain all the necessary facilities, and to transport freight and passengers with promptness and dispatch. This contract was held not opposed to public policy. It bound the ferry company to furnish all the facilities required, and was not in restraint of trade, inasmuch as it was limited in its operation to one single locality.

It is well settled that a railroad company cannot make any discrimination in freights, where the goods in question are sent over some other line from the terminus, than that with which the company has contractual relations. *Twells v. Pennsylvania R. R. Co.*, 3 Am. L. Reg. (N. S.) 728; *Baxendale v. Great Western R. Co.*, 94 Eng. C. L. 308. It is evident that such discrimination is contrary to public policy, as it is calculated to discourage proper competition. On the same ground it has been held that a railroad company cannot enter into a contract to deliver all grain transported by it to a certain warehouse, to the exclusion of all others. *Chicago and North Western R. R. Co. v. People*, 56 Ill. 365.

Railroad companies must furnish to all express companies applying to them equal facilities for the transportation of express matter. *Express Companies v. Railroad Companies*, 3 Am. and Eng. R. R. Cas. 594. They cannot make a contract with any one express company to carry for it ex-

clusively. *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188; *Sargent v. Boston and Lowell R. R. Co.*, 115 Mass. 416; *Sandford v. Railroad Co.*, 24 Pa. St. 378.

GEORGIA RAILROAD AND BANKING CO.

v.

SMITH.

(*Advance Case, Georgia. February 27, 1883.*)

Where the Constitution of a State authorizes the General Assembly to regulate railroad freight and passenger tariffs, and to prevent unjust discrimination, and to require reasonable and just rates of freight and passenger tariff, a law passed by such assembly establishing a board of railroad commissioners and authorizing them to make reasonable and just rates of freight and passenger tariff, of which a schedule should be made for each railroad in the State, and providing adequate penalties for the enforcement of the rules and regulations of such commission, such an act will not be regarded as unconstitutional as a delegation of legislative powers.

Where the charter of a railroad corporation, which grants the company exclusive privileges, establishes a maximum freight and passenger rate, such a provision does not, in view of the maxim which requires a strict construction of a charter granting exclusive privileges, confer upon such railroad company a vested right to charge any rate less than such maximum, and an act establishing a railroad commission and authorizing them to establish a schedule of freight and passenger rates, and requiring all railroad companies to conform thereto, does not impair the obligation of any contract contained in such charter.

CRAWFORD, J., delivered the opinion of the court:

The Georgia Railroad and Banking Company, denying the power of the railroad commission of the State of Georgia to regulate freight and passenger tariffs over its road, has filed this bill that the right of the said commission to exercise this power may be judicially determined.

This power is denied: 1. Because by art. 4, sec. 2, par. 1 of the Constitution of Georgia, the duty is imposed on the General Assembly to regulate freight and passenger tariffs. 2. Because the act of October 14, 1879, is unconstitutional and void, as being an attempt to delegate legislative powers to said railroad commission. And because it is in conflict with the Constitution of Georgia, which forbids the imposing of excessive fines or inflicting unusual punishments. 3. Because the charter of said company is a contract between the State and the company, by which the company has the right to charge any rates of freight and passenger tariffs not exceeding those limited by its charter; whereas, the said commission, under the authority given it by the act of October 14, 1879,

forbids the said company, under heavy penalties, from charging the rates allowed by said contract. Wherefore, the said act is, by virtue of par. 1, sec. 10, art. 1, of the Constitution of the United States, which prohibits the States from passing any law impairing the obligations of a contract, unconstitutional, null and void.

The prayer of the bill is: 1. That the act of October 14, 1879, be declared null and void. 2. That it be declared inoperative against the Georgia Railroad and Banking Company. 3. That the said commission be perpetually enjoined from prescribing rates of fare and freight over the Georgia railroad and its branches, or in any manner enforcing against it the provisions of the said act of October 14, 1879. 4. For general relief.

The chancellor below, after considering the bill and exhibits of complainant, and cross-bill and exhibits of defendants, refused the injunction prayed for, and that refusal is assigned as error. The questions to be determined by this litigation are: 1. Whether the act establishing the Railroad Commission of the State of Georgia with its powers and duties is not unconstitutional and void, because it is the duty of the legislature under the Constitution to regulate freights and passenger tariffs, and this act seeks to delegate this power to the said commission. 2. Whether the said act, in so far as it attempts to interfere with the chartered rights of the Georgia Railroad and Banking Company, does not violate that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts.

The Constitution of 1877 confers upon the legislature the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations and requiring reasonable and just rates of freight and passenger tariffs. It further makes it the duty of the legislature to pass laws from time to time to carry into effect the constitutional provision and to enforce the same by adequate penalties. For this purpose and to this end was the act under consideration passed. It declares, among other things, substantially, that if any railroad doing business in this State shall charge, collect, demand or receive more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, the same shall be deemed guilty of extortion, and, upon conviction, dealt with as by the said act provided.

In order that fair and reasonable tolls and compensation for the transportation of passengers and freight might be certainly had, it was also provided that there should be three railroad commissioners appointed, whose duty it should be to make reasonable and just rates of freight and passenger tariffs, to be observed by all the railroad companies doing business in the State on the railroads thereof. And that a schedule of such rates should be made for each rail-

road doing business in the State, which said schedule should be deemed and taken in all the courts of the State as sufficient evidence that the rates were just and reasonable charges for the transportation of passengers and freights and cars upon the railroads in all cases brought against any road involving unjust discriminations or improper charges. Adequate penalties were likewise provided for the enforcement of the rules and regulations of the said commission, for the establishing of reasonable and just rates to be observed by the railroad companies. Thus it appears that the Constitution provided that the legislature should have power to regulate the railroad freights and passenger tariffs, and to require reasonable and just rates for both; that it made it also the duty of the legislature to pass laws necessary for its execution, and that in pursuance of that duty the law complained of was passed.

The object of the constitutional provision and the legislative enactment, was to give proper protection to the citizens against unjust rates for the transportation of freight and passengers over the railroads of the State, and to prevent unjust discrimination, even though the rates might be just. It was not expected that the legislature should do more than to pass laws to accomplish the ends in view. When this was done its duty had been discharged. All laws are carried into execution by officers appointed for that purpose, some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced.

Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws are by no means uncommon in the history of our legislation. I need only mention the power given to the judges of the Supreme and Superior Courts of this State to establish rules which, if not in conflict with the Constitution of the United States, of this State or the laws thereof, are binding and must be obeyed. And it has never been claimed that they were unconstitutional because they had not been passed by the legislature and read three times and on three separate days in each house of the General Assembly.

The act of October 14, 1879, provides that fair and reasonable rates only shall be charged by the railroads of the State. Did the constitutional convention by par. 1, sec. 2, art. 4, intend more than the passage of a general law, such as this, to carry into effect the clause here referred to? It certainly was not contemplated that the details of rates to be fixed over the many miles of railroads in the State should be settled and determined by the legislature. The many influences that combine to cause changes in the ever-varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the legislature just and proper schedules for the various railroads, with their differences of length, locality and business, appears to us to

be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so when it is remembered that schedules just and right when arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the General Assembly might the succeeding year bankrupt every railroad corporation in the State.

In our judgment the act creating the railroad commission is not unconstitutional and void. That it may need amendments is more probable; indeed, an experiment so new and untried would be exceptional if it were perfect in its very inception. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and great, and this we understand to be the distinction recognized by strikingly all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted. The former would be unconstitutional, whilst the latter would not. 91 Ill. 357; *Tilly v. Savannah, etc., R. R. Co.*, and cases cited; pamphlet dec. Georgia, September Term, 1880; 94 U. S. 113, 155, 164.

2. The next question made by the record is, whether the act of October 14, 1879, violates the chartered right of the stockholders of the Georgia Railroad and Banking Company, as contained in the twelfth section of the act of incorporation. That clause is as follows: "That the said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; Provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents per mile for each passenger; Provided always, that the said company may, at any time when they see fit, rent, or farm out all, or any, of their said exclusive right of transportation or conveyance of person on the railroad or railroads, with the privilege to any individual, or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned." Acts of 1833, p. 262.

It is well settled that the charters of incorporated companies, granting exclusive privileges to the corporators, are always to be strictly construed, and that whatever is not expressly given therein, or not necessarily implied therefrom, is withheld. In support of this rule of law, we quote from the case of *Commonwealth v. Erie & North-east R. Co.*, 27 Pa. St. 339. Black, C. J., in rendering the judgment of the court, said: "That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words, or by necessary implication. All powers not given in

this direct and unmistakable manner are withheld. . . . In such cases ingenuity has nothing to work with since nothing can be either proved or disproved by inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation." And again is the rule clearly and forcibly stated in the case of *Fertilizer Co. v. Hyde Park*, 97 U. S. 659. Swayne, J., said: "The rule of construction in this class of cases is, that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Guided by these authorities let us see whether the 12th section of this charter can stand the test prescribed, and give to the company what it claims. It was incorporated "to construct a rail or turnpike road," and, after providing for its organization, conferring upon it the right to cross the public roads and bridge the rivers and water-courses, and giving it the right of way, etc., the act then proceeds to declare the special rights to be enjoyed. These were that the company should "at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads, to be by them constructed while they see fit to exercise the exclusive right."

The exclusive right here granted was to be enjoyed only upon one condition, and that was that the company should not charge more than fifty cents per hundred pounds on heavy freight, and five cents a mile for every passenger transported over the road. The legislature was dealing with the subject-matter of a public highway, and public highways had, therefore, been open to the free use of all persons for travel, for the transportation of goods and the conveyance of passengers without the payment of tolls or charges. To deny the use of a public highway to the people at large, and give it to an incorporated company for its exclusive use to convey passengers and freights was deemed an extraordinary privilege; and this extraordinary privilege the legislature agreed to grant to the company, provided it would not charge more than the above rates. Or, to put it in the form of a contract, it was agreed by the State that this company might build the road, and so long as it carried freight and passengers as prescribed by its charter, it should not in any wise be used by the public, but by the company exclusively.

Under no reasonable construction of this charter can it be claimed that the State contracted with the company to guarantee to it

TEXAS AND PACIFIC R. R.

v.

JAMES A. FORT.

(Advance Case, Texas. Austin Term, 1882.)

Suit was instituted against the Texas and Pacific Railway for baggage lost at some unknown point between Memphis and Dallas, through checks for said baggage being delivered to plaintiff at Memphis by an agent of the Memphis and Little Rock Railroad, over three uniting lines, including the Texas and Pacific Railway.

Held, That the check delivered at Memphis was the check of appellant railroad, as well as of the other companies; that the contract was appellant's contract, and it was bound by it.

Rule in 1 Woods' C. C. Rep., 184, cited and adopted: When several carriers unite to complete a line of transportation, and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received.

This suit was filed in the County Court of Dallas county, October 17, 1881, by appellee to recover of appellant the value of a trunk and its contents alleged to have been lost by appellant.

The petition alleged, in substance, that appellant was an incorporated company, and a common carrier of passengers, baggage, etc., on its line; that on December 20, 1880, appellee bought of appellant's agent, at Memphis, Tenn., through tickets, for himself and family, to Dallas, Texas, and at the same time delivered his baggage to said agent to be checked and transported to Dallas; that said agent so checked the baggage, and appellee and his family came through on said tickets over defendant's line, and reached Dallas about December 26, 1880, and then, and repeatedly thereafter, called on defendant's agent there for his baggage, but failed to get one of his trunks and contents, so shipped; the trunk contained the property of plaintiff's wife and clothing of their minor children, viz. (then follows a list of the articles); that said trunk and contents were lost or stolen while in defendant's possession, to plaintiff's damage three hundred dollars, etc.

Defendant plead general denial.

The case was tried without a jury, and the court requested to find its conclusions of fact separately.

The court filed its conclusions of fact, and on these gave judgment for plaintiff.

Defendant's motion for new trial being denied, it gave notice of appeal.

Appeal bond filed December 29, 1881.

Assignments of error filed same day.

The court's conclusions, in substance, were, that plaintiff bought coupon tickets for himself and family, about December 22, 1880, at Hopkinsville, Kentucky, to Dallas, Texas, with which they came to Dallas via Memphis, Tennessee; that, at Memphis, the agent of the Memphis and Little Rock Railroad checked for plaintiff seven trunks to Dallas, said checks being stamped thus: Memphis—Dallas, Texas, via M. & L. R., C. & F., T & P., which indicated the different railways over which the baggage would come, the letters T. & P. indicating defendant's railway; that plaintiff, at defendant's depot at Texarkana, defendant's eastern terminus, demanded of defendant's baggage master to see his baggage; that said master refused, saying it was his own business to see after the baggage, the railroad company being responsible therefor; plaintiff never saw his baggage after leaving Memphis until he reached Dallas, and, on arriving there, he received six trunks; that the seventh trunk was never delivered to him; that plaintiff and family were immigrants; that the contents of said trunk were of the value claimed; and "the court finds, under the above facts, that the law is with plaintiff, and that he is entitled to a judgment for the value of said baggage, with damages thereon at eight per cent per annum from January 1, 1881, the value herein as charged in plaintiff's petition, to wit, two hundred and ten dollars, and in addition thereto, eight per cent, as damages, from January 1, 1881."

Appeal from Dallas county.

DELANEY, J.—Although there are several assignments of error, there is but one question in the record, and that is whether appellant is responsible for the value of the baggage lost at some place, not ascertained, between Memphis and Dallas.

No question is made as to the authority of the agent at Memphis to check the baggage through to Dallas on the roads of the several companies.

The delivery of the checks constituted a contract, and that contract must have imposed upon one or all these companies certain duties and liabilities in the premises; and the matter for us to determine is the character of that contract, and of the duties which it imposed.

Counsel for appellant present their view of the whole case in a single proposition, as follows: "When a person purchases a through ticket over several railroads, and procures a corresponding check for his baggage, and the baggage is afterwards lost, the company on whose road it is lost is responsible therefor; but the evidence must show that it came to the hands of the company charged with the loss, and that it was lost by it."

If this proposition be correct, the delivery at Memphis of the check for the trunk which was afterwards lost constituted three distinct contracts, each one of which was unlike the other two. The

contract between appellee and the first company was an unconditional agreement that the company should carry the trunk to Little Rock, or to the end of its line. The contract with the second company was conditional. That company agreed to convey the trunk, if delivered to it by the first. The third contract, that between appellee and appellant, had two conditions. There are two provisos between it and responsibility: that it would be responsible, provided the first company delivered the trunk to the second, and the second to the third. As the number of the connecting lines increases, the responsibility diminishes, and with the diminished responsibility, it is natural that there should be a diminution of the care and attention necessary to the safe transportation of baggage. There was nothing conditional about the payment of the fare; that was made certain by being exacted in advance.

While we cannot assent to the proposition of appellant's counsel, we admit that it is sustained by high authority. (See Thompson on Carriers of Passengers, p. 434; 61 New York, 538; 52 Ill., 81.) Other authorities, however, equally eminent, take the opposite view. In the case of *McCormick v. The Hudson River Railway*, 4 E. D. Smith, p. 181, a case almost exactly like the present, the last company was held responsible for the loss of a trunk, for which it had given its check at Buffalo long before the trunk reached its road. And there was no proof that the trunk ever came to the hands of the company, except that at Buffalo plaintiff received the company's check for the trunk and other baggage, and the additional fact that the company delivered the other baggage, but failed to deliver the trunk. The court considered this sufficient proof that the company had received the trunk. (See also *Hart v. Railway Co.*, 4 Selden, 37.) In our opinion, the check which was delivered to appellee at Memphis was the check of appellant as well as of the other companies. The contract was appellant's contract, and it was bound by it.

To establish any other rule would, in our opinion, amount to a denial of all remedy in the great majority of cases.

In the case of *Harp v. The Grand Era* (1 Woods' C. C. Rep., 184), the rule is laid down that when several carriers unite to complete a line of transportation, and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received.

Our opinion is that the judgment should be affirmed.

See note 2, Am. & Eng. R. R. Cas. 94.

TEXAS AND PACIFIC RY. CO.

v.

W. L. FERGUSON.

(Advance Case, Texas, 1882.)

Where different railways, forming a continuous line, run their cars over the whole line and sell tickets for the whole route, and check baggage through, each carrier is the agent of all the others to accomplish and complete the carriage and delivery of the goods, and an action will lie against either carrier for the baggage lost.

The market value of the articles lost is deemed an ultimate compensation, and this is the proper measure of the right of recovery.

Damages cannot be recovered for expense incurred in making search for lost baggage.

Interest, as a general rule, is not recoverable on unliquidated demands, and it cannot be said that the recent modifications of the rule has unsettled the rule heretofore applicable in this State.

Articles not intended to be used on the passenger's trip, but being transported merely for future or prospective household use, is not considered baggage in that sense whereby the railway company would be liable for its loss, and a refusal of a charge asking such instruction to the jury was error.

PLAINTIFF's amended petition, September term, 1881, states in substance: That the defendant's railroad extends from Texarkana on the east to Fort Worth; that during 1880 defendant was doing a business of carrying passengers in connection with the Mississippi and Tennessee Railroad; that on November 4, 1881, plaintiff took passage on last road, having procured tickets on the same at Grenada, Mississippi, for Dallas, Texas, by way of the Texas and Pacific Railroad, in connection with other roads, and there had three trunks of baggage checked to Fort Worth, checks being given him stamped thus: "Ft. Worth. Grenada, Miss., via T. & P., I. M., M. L. R., M. & T. R. R.;" said trunks containing two feather beds worth \$80; ten quilts, \$70; three ditto, \$9; two blankets, \$6; coverlet, \$8; counterpane, \$3, and wearing apparel, in all worth \$250.25; that defendant did not safely transport and deliver to him at Fort Worth or elsewhere said baggage, and by reason of defendant's negligence said baggage was lost, to his great inconvenience, trouble and expense, in being deprived of the use of said baggage, and in his efforts to find it, to his damage \$250.

Defendant filed demurrer and general denial.

The jury returned a verdict for \$274.80, on which judgment was rendered.

Defendant filed motion for new trial.

Motion for new trial denied. Defendant excepted and gave notice of appeal.

fraud, delinquency or injustice of the debtor, or for some injury done by him to the creditor." (See *Fowler v. Davenport*, 21 Texas Report, 635-6.)

This, although the general rule, has been of late greatly modified in some of the States of the Union.

It is laid down by Mr. Sedgwick, in his work on the Measure of Damages (sixth ed.), p. 466, that "it is a general rule, that interest is not recoverable on unliquidated demands. He quotes authority abundantly to support the proposition, among which the remark of Judge Washington, at nisi prius, that "it is not agreeable to legal principles to allow interest on unliquidated or contested claims in damages."

It is said, in a note, however, that recent decisions have modified this general rule, citing cases to illustrate the qualification of the rule from several States of the Union. Without attempting to present the modern discriminations as to the doctrine under consideration, as decisions have applied it, we are not prepared to say that the recent modifications have unsettled the rule as has been, up to this time, recognized in our State in its application to a question of the measure of damages resulting, not from tort, trover or trespass, but from a cause of action founded on breach of contract merely to transport baggage. For a discussion of the subject in the light of modern decisions, see Sedgwick's Measure of Damages (sixth ed.), top pp. 466 and 477, and notes; margin, pp. 377 and 385-6.

The court erred in refusing to give the third special instruction asked to be given by the defendant. If the articles of bedding contained in the plaintiff's trunks were not intended to be used on the trip which the plaintiff was making, for his personal use and comfort, or that of his family travelling with him, but were being transported in that mode merely for future or prospective household use—being conveyed, in a word, as ordinary freight is sent from one place to another—the articles referred to would not be considered as baggage, in a sense whereby the railroad company would be liable for its loss under the rules of law which apply to a railroad company's liability for baggage. Whether such articles fall within the meaning of a passenger's personal baggage or not, is a mixed question of law and fact, to be determined by the jury, under proper instructions from the court. It is correctly remarked in the "notes" to Thompson's Carriers of Passengers, p. 510, sec. 1, that "It is of course impossible to give any general rule which will be equally applicable to all cases, for the determination of what is and what is not properly baggage. This depends, to a very great extent, upon the circumstances of each individual case, upon the length of the journey, the purpose for which it is made, the position in life and occupation of the traveler, the mode of conveyance, and the character of country through which he intends to pass. The adjudicated cases on this subject

justify the statement that anything may be carried as personal baggage which travellers usually carry for personal use, comfort, instruction, or amusement, having regard to the circumstances enumerated above." (Citing numerous authorities.) Thus, while it would be manifestly improper to permit a business man, making a short trip on a railway, to recover for bedding packed with his baggage, yet it was held in the case of a steerage passenger upon a sea voyage, who was bound to provide his own bedding, that a reasonable amount of such articles properly constituted a part of his baggage, and, if lost, was the subject of recovery. (See also *Hutch. on Carriers*, sec. 679, 684-6; 98 Mass. 83, 371; 106 Mass. 145; 10 Cush. 506.)

On another trial, the application should be made of these rules which relate to the kind of baggage for which the defendant is liable as a carrier, and under proper instructions to the jury, they will determine whether the defendant is liable for the loss of all of the articles contained in the plaintiff's trunks, or if not, as to what portion thereof the railway company may be liable.

We conclude that the judgment ought to be reversed and the cause remanded.

WHITE, P. J.—Examined and approved, and judgment reversed and cause remanded.

See note, 9 Am. & Eng. R. R. Cas. 94.

H. & T. C. R. R. Co.

v.

FREDERICKA RAND ET AL.

(*Advance Case. Texas, 1882*).

See the opinion *in extenso* for evidence held sufficient to sustain a verdict of damages against a railway company for failure and refusal to transport a passenger upon application and tender of charges.

A mental suffering may be estimated as a basis of damages.

Negligence of the agent is negligence of the railroad company, and the company is liable therefor.

APPEAL from the County Court of Limestone.

WILSON, J.—Appellee sued appellant in the County Court of Limestone County for damages in the sum of one thousand dollars, alleging their cause of action as follows:

That appellant owned a line of railroad extending from the city of Houston to the city of Denison, through Limestone County,

Texas, and that on this line of road, in Limestone County, was a station called Thornton.

That appellant run and operated this line of road as a common carrier of passengers and freight.

That appellee Fredericka, on the thirtieth day of August, 1881, was near the station on said road called Thornton, where she had been staying for some time for the benefit of her health, she having gone there in delicate health; that she resided in the city of Galveston, where she had a husband, her co-plaintiff, and children; that on said thirtieth day of August, having recovered her health, she desired to return to her home and family in Galveston, and applied to the ticket agent at Thornton for a ticket and transportation over said line of road, and offered to pay said agent the price of said ticket; that this occurred about ten o'clock in the night, a few minutes before the train on which she sought passage passed the station; that owing to the carelessness and inattention of the said ticket agent she failed to get a ticket, and said agent failed to signal said train to stop at said station, and it passed on without her, and she was compelled to walk a distance of about two miles, in the night, and over a tiresome road, to get to a place to stay the balance of the night; and that by reason of all this she became sick, and remained sick for a long time, and suffered much mentally and physically.

Appellant pleaded the general denial, and contributory negligence on the part of appellee Fredericka, because she sought to travel on the night train, instead of a day train, etc.

The parties waived a jury and submitted the decision of the case to the court, and the court rendered judgment in favor of appellees against appellant for the sum \$300, and from this judgment appellant has appealed to this court.

The appellees in this court suggest delay, and ask for an affirmation of the judgment with damages.

Appellant has not appeared in this court with any argument or brief of authorities in support of his several assignments of error, and we are not aware of the particular error or errors relied upon, by him for reversal of the judgment, farther than such as are disclosed in his assignments of error. These assignments of error, ten in number, are substantially that the court erred in its conclusions of fact, and in its conclusions of law, which conclusions, at the request of appellant in the court below, were reduced to writing, and are a part of the record before us.

The trial judge found the substantial allegations contained in appellee's petition to be true, and we think the evidence in the case fully sustains the finding.

The conclusions of law, as stated by the judge, are:

"1. Plaintiff was entitled to judgment for damages which re-

sulted, and which might reasonably be expected to result, from her being left, under the circumstances.

"2. Mental suffering may be estimated as a basis for damages.

"3. The negligence of the agent is the negligence of the railroad company, and the defendant is liable therefor."

We are of the opinion that these propositions, or conclusions are correct when applied to the evidence in this case. (Redfield on Carriers, sec. 425 et seq.; *Williams v. Vanderbilt*, 28 N. Y. 217; *Ward v. Vanderbilt*, 24 How. Pr. R. 144; *Heim v. McCaughan*, 32 Miss. 17.)

We find no error in the judgment of the court below, and will affirm it; but we do not think it is that character of case which demands an affirmance with damages.

Judgment affirmed.

See note 9 Am. & Eng. R. R. Cas. 94.

STUART MOORE

v.

CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. Co.

(59 *Mississippi Reports*, 243.)

Generally a party cannot impeach the credibility of his own witness; but he may, for this purpose, prove contradictory statements of an unfriendly witness, whom he is entrapped into calling, and by whose testimony he is surprised.

If the circumstances raise a presumption that the party, when he introduces the witness, knows that he will not testify as he represents, evidence of surprise is requisite before the contradictory statements will be admitted.

A plaintiff who, in a suit for damages against a railroad company, calls witnesses who testify that they were not present when he was injured, cannot, in order to impeach their credibility, ask them whether they have stated otherwise to designated persons.

If the plaintiff excepts to such ruling on the point so presented as to involve only his right to impeach his witnesses' credibility, this court cannot consider the case as it would have been if he had stated at the time that his purpose was to refresh their memories.

Whether the court can examine persons in the defendant's service at the plaintiff's suggestion without affecting his right to impeach them, quere; but the power, if it exists, is discretionary, and refusal to use it is not error, whatever its unwarranted exercise may be.

Admissions of a conductor, made days after a passenger falls from his train, that he kicked him off, are not part of the *res gestæ*, and do not bind the railroad company.

A new trial will not be granted on the ground of newly-discovered testimony, the only effect of which is to impeach the credibility of a witness. 3 *Graham and Waterman on New Trials*, 1074.

APPEAL from the Circuit Court of Marshall County.

9 A. & E. R. Cas.—26

Hon. J. W. C. WATSON, Judge, presided at the trial of this case, and Hon. J. A. GREEN presided at the new trial, by interchange.

At the trials of this action of trespass on the case, the appellant testified that he was travelling on a freight train, which carried passengers, between Holly Springs in Marshall County and another station on the appellee's railroad, that he paid his fare to a brakeman, who demanded it as if in authority, and that the conductor afterwards kicked him off the train; but the appellee's evidence tended to show that he was attempting to ride free, when he saw the conductor coming and tried to jump off, but slipped and fell. After the appellee had closed its evidence at the new trial, the appellant examined certain persons, who stated that they were not present at the time of his injury, but was prevented from asking them what they had stated elsewhere, upon the ground set forth in the opinion. The appellant then moved the court to call and examine, as witnesses, these persons, and also Brewer, who had not testified at the new trial, and whose status at the first trial is stated in the opinion; and to permit the introduction in evidence of their contradictory statements. This motion the court overruled, notwithstanding evidence that the appellee had taken them into its service after this action was commenced.

E. M. Watson, for the appellant, argued, orally and in writing,

1. The rule that a party cannot impeach his own witness should not be applied to Brewer in this case. If the plaintiff had known that this witness would testify differently, he could not assail his testimony; but he was deceived, and had the right to expose the imposture. *Cowden v. Reynolds*, 12 Serg. & R. 281; *Sewell v. Gardner*, 48 Md. 178; *Skipper v. State*, 59 Ga. 63; *Hemingway v. Garth*, 51 Ala. 530; *Blackburn v. Commonwealth*, 12 Bush, 181; *Brooks v. Weeks*, 121 Mass. 433; 2 Phillips Evid. 981, 986; *Starkie Evid.* 245, 249; 1 Greenl. Evid. § 444. After writing facts to Gray which sustained the plaintiff's case, the witness was employed by the railroad company and altered his testimony. If the appellant acted in good faith, and the witness did not, there is no reason why the latter's treachery should not be exposed by his victim.

2. Other witnesses, after stating the facts favorably to the plaintiff, were employed by the defendant, and made different statements when examined. Clearly the plaintiff then had the right to ask them whether they had made the former statements. This was one method of refreshing their recollections as to the facts. In a case like this, where the company was employing all persons who saw the transaction, with the manifest purpose of preventing them from testifying for the plaintiff, he should have been allowed to cross-question such persons, although called as witnesses by himself.

3. After holding that the plaintiff, if he called these witnesses,

could not contradict them, and after the defendant refused to put them on the stand, the court should, on the plaintiff's motion, have examined them. They are employees of the railroad company, and are conversant with the facts of this case. It was within the power of the court to compel them to testify in furtherance of the ends of justice. *Starkie Evid.* 245, 249. On all questions of the admissibility of evidence the court applied the narrowest rule, when the case demanded the greatest liberality.

4. The newly-discovered evidence, if introduced, would have changed the result. It was not cumulative testimony, and due diligence in obtaining it was shown. *Garnett v. Kirkman*, 41 *Miss.* 94; *Cooper v. State*, 53 *Miss.* 393; *Vardeman v. Byrne*, 7 *How.* 365; 3 *Graham & Waterman on New Trials*, 1021.

W. P. & J. B. Harris for the appellee.

1. No deceit was practised by Brewer as the appellant, no fraud in procuring himself to be examined as a witness, and there was no surprise in fact. The case came under no exception, recognized by the authorities, to the rule that a party voluntarily calling a witness shall not be allowed to impeach him by any general evidence touching his veracity. *Fairly v. Fairly*, 38 *Miss.* 280; *Bullard v. Pearsall*, 53 *N. Y.* 230; *Coulter v. American Merchants' Express Co.*, 56 *N. Y.* 585; *Craig v. Grant*, 6 *Mich.* 447; *Griffin v. Wall*, 32 *Ala.* 149; *People v. Jacobs*, 49 *Cal.* 384; *Rockwood v. Poundstone*, 38 *Ill.* 199; *Stearns v. Merchants' Bank*, 53 *Penn. St.* 490; *Quinn v. State*, 14 *Ind.* 589; *Hunt v. Coe*, 15 *Iowa*, 197; *McDaniel v. State*, 53 *Ga.* 253; *Melhuish v. Collier*, 15 *Q. B.* 878; In England an act of parliament has given the right to discredit a party's own witness under restrictions. The Code of Georgia allows it if the party has been entrapped into calling the witness; so in Massachusetts. In Indiana he may, under certain conditions, introduce discrediting evidence in civil cases. These statutes recognize or rather prove the common-law rule. We have given a larger number of citations than we think necessary, having the purpose to give the rule enforced in many States. The text-writers, English and American, support the rule, that unless a party has been in effect entrapped into calling the witness, or is, under some inflexible rule, bound to call him, he cannot introduce evidence for the purpose of discrediting him, whether it affects his general character for veracity, or his veracity as to the particular matter, by proof of former contradictory statements. 2 *Phillips Evid.* (Cowan & Hill ed.) 985, 993; 2 *Best Evid.* § 645; 1 *Greenl. Evid.* § 444; 1 *Wharton Evid.* 549, et seq. We assert on these authorities that there must be a surprise resulting from a fraud in the witness, and that must be shown to admit of the introduction of contradictory declarations.

2. On the new trial the evidence is conflicting, and the charges correct. We need not urge that unless the jury was misled by an

improper ruling the second verdict must stand. The witnesses, who stated that they did not see the act, gave no testimony which injured the appellant's case. On what ground should the court have allowed proof that they stated the contrary out of court? The most extravagant opponent of the common-law rule would not contend for the right to discredit these witnesses. It is too late to urge that the object of the question was to refresh their memories. As to the employment of witnesses, it appears that, except Brewer, they were of that class along the defendant's road who are off and on. A majority of the appellee's witnesses had no connection with the road. The character of the appellant's motion to examine Brewer and the other employees will be seen by inspection. New trials will not be granted in cases of this character on newly-discovered testimony, which tends only to discredit witnesses.

W. P. Harris, on the same side, made an oral argument.

COOPER, J.—The appellant sued the Chicago, St. Louis & New Orleans Railroad Company to recover damages for an injury sustained by him in being forcibly ejected from one of its trains while the same was in motion. At the April Term of the Circuit Court of Marshall County there was a trial of the cause, which resulted in a verdict and judgment for the plaintiff. The defendant moved for a new trial, which was granted, and thereupon the plaintiff excepted to the action of the court in granting the new trial, and a bill of exceptions was signed, embodying the evidence introduced. At the October Term of the court another trial was had, resulting in a judgment for the defendant. The plaintiff made a motion for a new trial, which was overruled; and the plaintiff again excepted, took another bill of exceptions, and now prosecutes this appeal, assigning for error the action of the court below in granting the new trial asked by the defendant, and in refusing that asked by himself. On the first trial the plaintiff, in rebuttal of the evidence offered by the defendant, introduced as a witness one Brewer, who delivered testimony unfavorable to the plaintiff, who thereupon, for the purpose of impeaching the credibility of the witness, offered in evidence a letter which had been previously written by the witness to one Gray, in which he made statements directly contradictory to the testimony given by him. The admission of this evidence was objected to by the defendant at the time, and its admission was one of the grounds of its motion for a new trial. If it was error to permit the evidence impeaching the credibility of the witness to be introduced, the new trial was rightly granted.

It is argued by counsel for the appellant that the court did not err in permitting this evidence to be introduced, because the plaintiff was entrapped by the witness into introducing him, and was surprised by his testimony. While we recognize the right of

a party who has been entrapped into introducing, and is surprised by the testimony of an unfriendly witness, to impeach his credibility by giving evidence of other and different statements made by him, we nevertheless think it was error to permit it to be done in this case, for the reason that no showing was made by the plaintiff, by his own affidavit or otherwise, that the testimony of the witness operated as a surprise on him, and because we think it fairly inferable from the other facts shown in the record that the plaintiff and his counsel anticipated that the witness would testify in effect as he did, and introduced him after they had received information that he had declared his intention not to adhere to the statement of the facts as contained in his letter. The rule is that a party cannot impeach the credibility of a witness introduced by him. But to this rule there are certain exceptions, created for the protection of litigants against the fraud of witnesses who are friendly to the opposing party. But where the facts or circumstances suggest the presumption that the party introducing a witness does so with knowledge of the fact that his testimony will not be in accordance with those things which he is professedly introduced to prove, some evidence at least of surprise ought to be required to overcome the presumption, for otherwise the exception would absorb the rule, and let in all the evils which the rule was established to prevent. A careful examination of the bill of exceptions satisfies us that the impeaching evidence ought not to have been permitted, and consequently that the new trial was properly granted to the defendant.

On the second trial the plaintiff introduced certain witnesses, who testified that they were not present when the plaintiff received his injuries, and thereupon the plaintiff's counsel asked them if they had not previously stated to certain parties, naming them, that they were present and saw the injuries inflicted. The defendant objected to this course of examination, giving as a reason for his objection that the plaintiff ought not to be permitted to impeach the credibility of his witnesses. The objections were sustained by the court, and this action is now assigned for error. In support of this assignment it is argued that the proposed course of examination ought to have been permitted, because the plaintiff was surprised by the testimony given by the witnesses; but that, if it was not permissible on that ground, yet the plaintiff had the right to thus examine his witnesses for the purpose of refreshing their recollections. It is clear that the examination ought not to have been permitted for the purpose of impeaching the credibility of the witnesses, for they had testified to nothing either in favor of or against the plaintiff, and there was no necessity to impeach their credibility for his protection. Their testimony, as the case then stood, could not be considered by the jury at all, because it amounted to nothing, and as the only legitimate effect of impeach-

ing evidence is to subtract from or overthrow the testimony of the witness, it follows that it ought not to be permitted in cases in which there is nothing to subtract from or overthrow.

We cannot consider the case now as it would have been, if the plaintiff had stated in the court below his purpose to be only to refresh the memory of his witnesses, and not to impeach their credibility. The objection interposed by the defendant was predicated on the supposition that the intention was to impeach their credibility. The court acted on this objection as stated, and the plaintiff excepted to the ruling of the court on the point as thus presented. He cannot now for the first time suggest that his proposed course of examination was legitimate for a purpose not disclosed in the court below. To permit this, would be for this court to review, not the case actually tried in the lower court, but one which might have been tried.

The court did not err in declining to direct the persons, whose names were suggested by the plaintiff, to be sworn as witnesses in the case. If such power exists at all in the court, which we think admits of grave doubts, its exercise must be left wholly in the discretion of the presiding judge, and a refusal to exercise it would not be a ground of error, whatever might be the effect of an unwarranted exercise of it. The remaining error assigned is that a new trial ought to have been granted because of the newly discovered evidence by the plaintiff.

The newly discovered evidence was that of a witness who, some days after the occurrences in which the plaintiff was injured, had a conversation with the conductor of the defendant, who the plaintiff testified had inflicted the injuries on him, in which conversation the conductor admitted to the witness that he had kicked the plaintiff from the train. It is apparent that these admissions would not have been admissible in evidence for any other purpose than that of impeaching the credibility of the conductor, who had testified on the trial as a witness for the defendant, and had stated that he had had no part in inflicting the injury on the plaintiff; for these declarations were not a part of the *res gestæ*, and only on that ground could they bind the defendant. *Dickman v. Williams*, 50 Miss. 500; 1 Greenl. Evid. § 113; *Sisson v. Cleveland Railroad Co.*, 14 Mich. 489; *Smith v. Betty*, 11 Gratt. 752; *Thalhimer v. Brinckerhoff*, 4 Wend. 394; *Virginia Railroad Co. v. Sayers*, 26 Gratt. 328. But a new trial will not be granted on the ground of newly discovered testimony, the only effect of which would be to impeach the credibility of a witness. 3 *Graham & Waterman on New Trials*, 1074.

We are therefore of opinion that there is no error in the record, and the judgment is affirmed.

As to evidence of admissions of conductor, see note, 7 Am. & Eng. R. R. Cas. 419.

HOUSTON AND TEXAS CENTRAL RY.

v.

LESLIE.

(Advance Case, Texas. 1882.)

The liability of the defendant railway company is measured by the fact that the injury received follows proximately from the culpable act complained of, and if erysipelas sprang from the injury, the dangers from that disease, as well as the sufferings produced by it, constitute a portion of the injury itself, and it is none the less so because under similar accidents producing fractures, that disease would not necessarily follow. The refusal of a charge opposing this principle *held* not to be error. The plaintiff's action being the direct and proximate cause of the injury, and it appearing from the facts proved that leaping from the cars while in motion is unsafe and dangerous, it follows that plaintiff contributed, by his want of care, to the casualty which occurred; that the fault of the defendant company in too speedily leaving the station did not endanger the personal safety of plaintiff, and in its very nature could not be the proximate cause of the injury which the plaintiff received through his own direct act, which was the proximate cause of said injury.

THIS suit was brought by James L. Leslie against the appellant, claiming \$20,000 as damages on account of injuries sustained and caused by the negligence of appellant's employees who were in charge of and conducting the passenger train of cars on defendant's line of road; which injuries were received at Van Alstyne, a station on said road. The circumstances attending the occurrence of which the plaintiff complains are in substance as alleged in the petition, that on the twenty-sixth day of April, 1874, at said station he entered a passenger coach on the express train, bound south, for the purpose of procuring seats for some ladies under his charge, and that while petitioner was so engaged the train was put in motion, leaving said station, and petitioner, in his effort to get off said coach, without any fault of his own, was hurled to the ground and his left arm broken in two places. The petition alleged that the train of cars was not stopped at said station the time required by law, nor was it stopped a sufficient length of time to permit persons to leave said train and alight in safety. That the ladies referred to had paid their fare and secured their tickets for passage and were at the usual places for passengers to embark. That neither the conductor of the train nor any other person in the employment of defendant offered to assist said ladies in getting on said train. Wherefore petitioner entered said passenger coach to assist said ladies and for the purpose of securing proper seats in the same. That the train was put in motion by the employees in charge aforesaid, without having stopped at the station before named not exceeding one minute, and that by the gross negligence

of the employees of the defendant in thus moving said train and without any fault of petitioner said injuries were inflicted upon him. The plaintiff alleged that the ladies under his charge were in feeble health and had some children with them, thus requiring his aid given as before stated. That when the train was started the agents of defendant knew that the plaintiff was on board, and that he desired to get off, and that he had entered said cars under the circumstances stated, with the knowledge and consent of the defendant's agents who were conducting said train. The defendant answered by general denial, and for special answer alleged that the plaintiff's entrance into the defendant's coach was without authority; that the train stopped a sufficient period of time to enable plaintiff to have left the car safely before the train moved; that the plaintiff remained until the train commenced to move, and when it was in rapid motion, without demanding that the train be stopped, leaped from the steps of the coach and thereby received his injuries; that the plaintiff was warned before thus leaping by one of defendant's employees not to do so, which warning he wholly disregarded. The cause was submitted to a jury; verdict and judgment for the plaintiff for \$900. Motion for a new trial, which was overruled, and defendant appealed. The grounds relied on for a new trial were because the court erred in refusing charges asked by the defendant, and because the verdict of the jury is contrary to the law and the evidence and because it is excessive. The appellant assigned as error the refusal of the charges asked for by him, and the overruling of the motion for a new trial.

WALKER, J.—The first ground assigned as error, that the court erred in refusing to give the instructions asked by the defendant, is answered by saying that the charge of the court embodied them all, except the fourth and last paragraph, in the very terms in which they were asked, with a few qualifications which did not improperly modify the propositions to which such qualification were applied. The law, as given, embraces substantially all the propositions asked to be submitted in the charge which the defendant asked to be given, and which were refused, except the fourth paragraph before referred to. The only portion of the paragraph referred to which need be discussed is as follows: "If you believe, from the evidence, that the permanent injury to plaintiff was occasioned by erysipelas or other disease not ordinarily consequent upon such fractures as plaintiff's, then you will not consider the suffering or injury arising from such disease in estimating the damages to the plaintiff." The court did not err in refusing this instruction. The liability of the defendant is measured by the fact, that the injury received follows proximately from the culpable act complained of, and if the erysipelas sprang from the injury, the dangers from that disease, as well as the

suffering produced by it, constitute a portion of the injury itself, and it is none the less so because, under similar accidents, producing fractures, that disease would not ordinarily ensue. We will now consider whether the verdict of the jury was contrary to the law and evidence. The plaintiff rests his right to recover damages for the injury occasioned by his leaping from the cars whilst in rapid motion, not upon the assumption that his act in so doing was one done in the exercise of ordinary care on his part, as the sequel evidently showed, but that the defendant was liable for the consequences which followed from his thus leaving the cars by reason of the unauthorized act of the defendant in stopping but one minute only at the station and thereby presenting the motive and temptation to the plaintiff to hazard his life or limbs by an effort to avoid being carried away, against his will, from his home in Van Alstyne. The plaintiff's action in the premises being thus the direct and proximate cause of the injury, as is shown both by pleading and evidence, and it appearing clearly from the facts proved that leaping from the cars in motion is unsafe and dangerous, it follows that the plaintiff contributed by his want of care to the casualty which occurred. The question then remains, do there exist any facts or is there presented a state of case on which, notwithstanding the plaintiff's contribution to his own misfortune, showing that the defendant is nevertheless liable for damages in consequence of the injury? The court instructed the jury as follows: "The plaintiff was bound in leaving the cars to take proper care and precautions to prevent injury, and he cannot recover if it appears from the evidence that in leaping from the cars he acted recklessly, carelessly, or negligently, and thereby contributed to his injuries. When plaintiff found the cars in motion it was his right to demand of the officers or managers of the same to stop the train, and if he has been carried from his home or place of business, he could have recovered compensation for returning and all damages that he might have sustained on account of being so carried away from his home and business. But he had no right to endanger his life or limbs by jumping from the cars in order to prevent being carried away from home, when he found that the cars were in motion; and if it appears that he did so jump, and that the injury so complained of was the result, you will find for the defendant. If you believe from the evidence that the plaintiff, being on defendant's cars without a ticket, and not a passenger, did leap from said car while the train was in rapid motion, and that his injury was caused by said leaping from the train, then the defendant is not responsible for such injury, and you will find for defendant." Under these propositions of law, the evidence, without conflict, negatives the plaintiff's right to recover, and the verdict was therefore distinctly contrary to the charge thus given. There is no evidence showing any other connection of the defend-

ant's agents with the accident except such culpability as may be implied from the short period of time the train of cars remained at the station, and if the defendant is not liable on account of its failure to stop at said station five minutes as required by law, or to have stopped at least a reasonable time, with reference to admitting passengers to board the train, there would exist no basis whatever for complaint against the defendant. The dereliction of the company to stop the five minutes required by law was not per se an act rendering the defendant liable irrespective of the question of contributory negligence on the part of the plaintiff. *Railroad Company v. LeGeirse*, 51 Texas, 189. In that case it was held that "while the company may have been guilty of negligence in not waiting five minutes at the station, such negligence would not justify the injured party in attempting to go on board the cars while in motion, if such act under the circumstances was negligence and contributory to the injury." The act of the plaintiff, which resulted in the injury being a dangerous one, so much so as to have wholly produced the fractures of plaintiff's arm, and one not immediately induced through the persuasion, direction, command or other influence attempted to be used by the defendant's agents, there is not apparent any circumstances to have operated upon the plaintiff's mind when he met with this accident, except his ill-judged determination to risk the consequences of the fatal leap. Therefore, applying the principles of law laid down in *Railroad Company v. LeGeirse* supra, the plaintiff's case, according to the evidence, did not entitle him to recover. "The rule," it is said in 6th *Wait's Actions and Defences*, 583, "may be said to be that a person cannot recover for an injury, received by reason of the negligence of another, if his own want of care directly contributed to the injury; for where one rushes upon danger, which might have been avoided by the exercise of ordinary care on his part, he cannot complain if others have failed to exercise a greater degree of care than he did. But in order to shield the other from liability the person injured must have not only been negligent, but his negligence must have been the proximate cause of the injury. He must, by his own want of care, have directly contributed to the injury. That is, by his own want of ordinary care, have done that which has directly brought about, and thus have placed himself or his property in a position where, except for his co-operated fault, no injury would have been sustained, and his act must have also been such as a man of ordinary prudence would not have done in view of the circumstances, otherwise he cannot be charged with that degree of negligence which operates to excuse the other from the consequences of his fault" (citing numerous authorities), and again, *Ibid.* 584: "To operate as a defence the plaintiff's negligence must have proximately contributed to the injury. If the negligence of the defendant was the proximate and that of the

plaintiff the remote cause of the injury, an action will lie, although the plaintiff was not entirely free from fault. The fact that the plaintiff is guilty of negligence does not relieve the defendant from using all reasonable care to prevent an injury to him or his property, and if he inflicts a willful injury or neglects to use a reasonable care to prevent it he cannot set up the plaintiff's negligence as a bar to the recovery therefor." (Citing cases), 75 Ill. 106; 51 Miss. 234; 28 Ohio, 340; 81 Ill. 590; 11 Hun (N. Y.), 333. A passenger upon a steam car who voluntarily and without cause exposes himself to danger, cannot recover for any injuries sustained by such exposure, as if a passenger attempts to get on or off a car when it is in motion. *Burrows v. Erie Railroad Company*, 63 N. Y. 566, where it is said that this seems to be the rule even though the train has stopped but started again before the passenger could alight (*Ibid.*), and the fact that the passenger is being carried by the station at which he wishes to alight will not excuse his act. *Menlestabt v. Ninth Av. R. R. Co.*; 11th Robt., N. Y. 377; *Jeffersonville R. R. Co. v. Hendricks*, 26 and 228. If the car is in rapid motion or the circumstances are such as to indicate that it is dangerous to alight, neither the advice nor directions of the conductor will justify the act. *Gumon v. N. Y. and H. R. R. Co.*, 3 Robt., N. Y. 25; *Penn. R. R. Co. v. Aspell*, 23 Penn. 147. Other similar instances of non-liability for injuries sustained through the incautions or imprudent acts of passengers on railroad cars can be readily multiplied. The act of the plaintiff in this case, whereby he sustained the injury complained of, is of the character of the case above instanced, and the plaintiff, when he found himself safely on the defendant's cars, although being rapidly carried away unwillingly from home, was required under the circumstances to act with prudence the same as would be required of any other passenger, and whilst the defendant was not without fault, that fault of too speedily leaving the station did not endanger the personal safety of the plaintiff, and in its very nature could not be the proximate cause of the injury which the plaintiff received through his own direct act and which was the proximate cause of said injury. See *Railroad Company v. LeGeirse supra*. It is true that it is not the least degree of fault on the part of plaintiff that will prevent him from a recovery; but it must be of such a degree as to amount to a want of ordinary or reasonable care on his part under the circumstances at the time of the injury. *H. and T. C. Ry. Co. v. Gosbelt*, 43 Texas, 573. But in this case the fault or negligence which caused the injury was the act itself which produced it, and which was committed by the plaintiff without any other fault of the defendant than that which was but the remote cause which influenced the plaintiff's action. We are of the opinion therefore that the second ground of error assigned is well taken; that the verdict is not supported by the law as applied to the evidence, and

that it is contrary to both. In such case it is the well-established practice of the Supreme Court to revise the discretion of the District Court refusing to grant a new trial. We think there was error in overruling the defendant's motion for a new trial, for which the judgment ought to be reversed and the cause remanded.

See note, 3 Am. and Eng. R. R. cas. 481; Id. 62.

WILLIAM SCHULTZ, by Guardian, etc., Respondent,
v.

THE THIRD AVENUE R. R. Co., Appellant.

(89 New York Reports, 242.)

Plaintiff's complaint contained three counts the first: alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon the trial the count ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized. *Held*, untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. (Code of Civil Procedure, § 722.)

Also *held*, that defendant was liable for the act of the conductor in throwing plaintiff from the car.

The evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and another witness for defendant, that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order so as to fix the company with liability in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded. *Held*, error.

It is competent for a party against whom a witness has been called to prove acts or declarations of his, showing feelings of hostility or malice on his part toward such party. If upon cross-examination he denies such facts, they may be proved by other witnesses, as the inquiry into his state of feeling toward the party is not collateral.

It seems, however, that the evidence to show hostile feelings of a witness should be direct and positive and not very remote.

Schultz v. Third Ave. R. R. Co. (14 J. & S. 211), reversed.

(Argued April 24, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 12, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 14 J. & S. 211.)

The nature of the action and the material facts are stated in the opinion.

Samuel Hand for appellant. The court erred in excluding defendant's offer to prove by Plass, another car-driver, that plaintiff's witness Reilly had a conversation with him in which Reilly asked him to testify falsely in another case that his brakes were out of order, so as to make defendant liable, the evidence offered being material, relevant and not collateral. (*Starks v. The People*, 5 Den. 106; *Newton v. Harris*, 6 N. Y. 346; *Long v. Lamkin*, 9 Cush. 365; *Drew v. Wood*, 26 N. H. 363; *Yerwin Case*, 6 Camp. 639; *Starr v. Cragin*, 24 Hun, 178; *Gale v. N. Y. Cent. & H. R. R. Co.*, 76 N. Y. 594, 595; *Hutchinson v. Wheeler*, 35 Vt. 340; *Collins v. Stephenson*, 8 Gray, 441; *Atwood v. Welton*, 7 Conn. 71; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 91; *Moore v. The People*, 53 N. Y. 639.) The court erred in denying the motion to dismiss the complaint, on the ground that, from the evidence, the act which produced the injury complained of is shown to be a wilful, reckless and malicious act by a servant of the defendant, beyond any authority, express or implied, conferred upon him by the defendant, and also upon the ground that, conceding the car to have been out of order, or the brake defective, that as a cause of injury or action it is too remote to maintain the suit. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Bayley v. The Manchester & L. Railway Co.*, 8 Law Reporter, 1872-73; *E. Co. Ry. Co. v. Broom*, 2 Exch. 326; *Higgins v. Watervliet R. Co.*, 46 N. Y. 23; *Jackson v. Second Ave. R. R.*, 47 id. 274; *Cohen v. D. D. B. E. & B. R. R. Co.*, 69 id. 176; *Sanford v. Eighth Ave. R. R. Co.*, 23 id. 347; *Shea v. Sixth Ave. R. R. Co.*, 62 id. 185; *Isaacs v. Third Ave. R. R. Co.*, 47 id. 129; *Wright v. Wilcox*, 19 Wend. 346; *Vanderbilt v. The Richmond Turnpike Co.*, 2 Comst. 482; *Mali v. Lord*, 39 N. Y. 385; *Fraser v. Freeman*, 43 id. 566; *McManus v. Crickett*, 1 East, 107; *Cox et al. v. Kealey*, 34 Ala. 344; *Little M. Co. v. Wetmore*, 9 Am. Law Reg. 621; *Eastern R. R. Co. v. Broom*, 6 Exch. 326; *Roe v. The Birkenhead, L. & C. J. Railway Co.*, 7 Eng. Law and Equity, 547; *Bayley v. The Manchester & L. Railway Co.*, 8 L. R. 1872-3; Story on Agency, § 456 [6th ed.]; *Kent's Com.* 259, citing *McManus v. Crickett*, supra, and *Parker v. The Essex Bank*, 17 Mass. 508, 510; *Inst. Lib.* 4, tit. 5, § 1; 1 Dig. Lib. 9, tit. 3; *Pothier Pand. Lib.* 4, tit. 9, u. 1, 2, 8; 1 *Domat*, B. 1, tit. 16, § 1; *Lord Staire's Inst.* B. 1, tit. 3, § 3; 1 *Black. Com.* 432.) The verdict of \$15,000 was erroneous, as plaintiff could not under his complaint recover more than \$10,000. (*Sedgwick on The Measure of Damages* [5th ed.], 1869, 685, 686;

McIntire v. Clark et al., 7 Wend. 330; Bowman v. Earle, 3 Duer, 695; Corning v. Corning, 2 Seld. 99; Custer v. Lawrence, 17 Johns. 111; Dey v. Dey, 3 Wend. 356; Moffet v. Sackett, 18 N. Y. 422; Casson v. Delany, 38 id. 180; Dunslow v. Hooke, 3 Wilson, 185; Livingston v. Rogers, 1 Comst. 587; Peak v. Oldham, Cowp. 276; Roberts v. Leslie, 9 N. Y. Week. Dig. 405.)

Nathaniel C. Moak for respondent. The motions to dismiss the complaint, on the ground that the evidence showed that the act which produced the injury complained of was the wilful, reckless and malicious act of the servant of the defendant, beyond any authority conferred upon him by the defendant, were properly denied. (Jackson v. Second Ave. R. R. Co., 47 N. Y. 275; Rounds v. Del Co. R. R., 64 id. 137; Day v. Brooklyn, 12 Hun, 435; affirmed, 76 N. Y. 593; Ochsenein v. Shapley, 12 N. Y. Weekly Dig. 316; Ct. App., 85 N. Y. 219-223.) As, in performing what appeared to be his duty to his employers, the conductor ejected the plaintiff from the car; whether it was a mistake of judgment on the part of the conductor or not, the defendant is liable for the manner in which he acted, and for the consequences of his acts. (Hoffman v. N. Y. C. R. R., 13 Weekly Dig. 313; Higgins v. Watervliet Turnpike Co., 46 N. Y. 26; Jackson v. Second Ave. R. R. Co., 47 id. 276; Hamilton v. Third Ave. R. R. Co. 53 id. 25; Shea v. Sixth Ave. R. R. Co., 62 id. 183; Round v. Delaware R. R. Co., 54 id. 136; Cohen v. Dry Dock R. R. Co., 69 id. 174; Peck v. N. Y. C. R. R. Co., 70 id. 591; Mott v. Consumer's Ice Co., 73 id. 543; Day v. Brooklyn, 12 Hun, 435; affirmed, 76 N. Y. 593; Ochsenein v. Shapley, 12 N. Y. Weekly Dig. 316; Ct. App., 85 N. Y. 214.) The damages were not excessive. The plaintiff was entitled to the verdict rendered under his complaint. (Code, § 481.) Defendant's offer to show that Reilly had endeavored to induce Plass to make a false statement as to the condition of another car on the occasion of another accident was properly excluded. (Gale v. Central R. R., 76 N. Y. 594; Higham v. Ganet, 15 Hun, 383.)

EARL, J.—This action was brought to recover damages for injuries received by the plaintiff by being knocked down and run over by one of defendant's cars on the Third avenue in the city of New York. Plaintiff recovered a verdict of \$15,000. The judgment entered upon that verdict was affirmed at General Term and then the defendant appealed to this court.

The learned counsel for the appellant presents for our consideration three grounds, upon which he asks to have the judgment reversed, and I will briefly notice each ground separately.

First. Plaintiff's cause of action is alleged in the complaint in three different counts. In the first count he alleges that on the 30th day of October, 1877, he got upon the rear platform of one of

defendant's cars as a passenger, for the purpose of riding down the avenue to his home; and that the conductor of the car came to him and, without asking for his fare, or giving him opportunity to pay it, violently pushed and threw him off the platform on to an adjoining railway track immediately in front of the horses attached to a car coming up the avenue; and that he was knocked down, run over and severely injured, "to his damage \$10,000."

In the second count the plaintiff alleges that on the same day he was accidentally upon the railway track, and that before he could escape therefrom he was knocked down by the horses attached to one of defendant's cars and run over and injured, because there was a defective brake upon the car, in consequence of which it could not be stopped in time to save him from injury, and the count closes "to his damage, \$10,000."

In the third count he alleges that, on the same day, he was run over and severely injured upon defendant's railway track in consequence of the carelessness and unskillfulness of the driver of one of defendant's cars, "to his damage \$10,000."

The complaint concludes with a prayer for judgment for plaintiff's damages "in the premises to the amount of \$20,000."

Upon the trial in his charge to the jury, the trial judge ruled that the plaintiff could recover only by satisfying the jury that he was pushed or thrown from the car by the conductor and thus injured as alleged in the first count of the complaint, and it must be assumed that the verdict was based upon that theory. The claim of the learned counsel for the defendant is, that as the first count alleges damages for but \$10,000, and the recovery was had under that count, the verdict for \$15,000 was unauthorized. But we think that the general prayer for damages at the conclusion of the complaint must control in this case. It is clear, on the face of the complaint, that all the counts have reference to the same accident, and the same injury, and that the different counts really allege the same cause of action in different forms. The action was commenced to recover on account of the one injury caused by defendant at the time and place named in the complaint, and in such a case the allegation, at the end of each count, of the damage which the plaintiff sustained, may be disregarded, the general prayer for judgment being sufficient to authorize and uphold the verdict.

Besides, if the complaint should have alleged in the first count damages to the amount of \$15,000, in order to sustain the verdict rendered, the defect in the complaint is one of the kind which may be amended. It did not affect the trial in any way or mislead or prejudice the defendant. The variance between the complaint and the verdict is such as "the right and justice" of the matter require should be disregarded or amended, and ample authority is given for this in section 722 of the Code of Civil Procedure, which provides that "each of the omissions, imperfections, defects, and

variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter and not altering the issue between the parties, or the trial, must when necessary be supplied and the proceeding amended by the court wherein the judgment is rendered or by an appellate court." This ground of error, therefore, does not furnish sufficient reason for reversing or modifying the judgment.

Second. It is also contended that the alleged act of the conductor, in pushing and throwing the plaintiff from the car was so wilful, reckless and malicious that the defendant is not responsible for it. That the defendant is responsible for it is abundantly shown by recent cases in this court. (*Jackson v. Second Avenue R. R. Co.*, 47 N. Y. 275; 7 Am. Rep. 448; *Rounds v. Del., Lack. & West. R. R. Co.*, 64 N. Y. 137; 21 Am. Rep. 597; *Day v. Brooklyn City R. R. Co.*, 12 Hun, 435; affirmed in 76 N. Y. 593; *Hoffman v. N. Y. C. & H. R. R. R. Co.*, in this court, not reported, 87 N. Y. 25, 4 Am. & Eng. R. R. Cas. 537.

Third. But there remains a more serious allegation of error to be considered. Upon the trial there was great conflict in the evidence bearing upon the accident. The plaintiff and two witnesses, Reilly and Morton, two discharged car-drivers formerly in the service of the defendant, testified that the conductor of the car upon which the plaintiff attempted to ride pushed or threw him off directly in front of the horses attached to a car going up the avenue, and that he was injured in that way. The conductor and another witness testified that the boy was not pushed or thrown off, but that he jumped off from the car and ran in front of the horses and was thus injured without any fault or misconduct of the conductor, and there was other evidence and circumstances bearing upon the credibility of the testimony given by the plaintiff and his witnesses. Reilly, upon cross-examination by defendant's counsel, was asked if he recollected a conversation with one Plass, a driver of one of defendant's cars, and approaching him to get him to say his brakes were out of order in order to fix the company with liability. He denied ever at any time or place having any such conversation with Plass, and testified that he knew he had no conversation with him to get him to so testify. Afterward Plass was called as a witness on the part of the defendant, and testified that he recollected Reilly's approaching him and having a conversation with him in reference to the brakes of his car, and he was then asked what that conversation was, which was objected to by plaintiff's counsel. Defendant's counsel then offered to prove that upon another occasion, not distant from the present accident, Reilly endeavored to procure the witness to make a false statement in regard to the condition of a car on this road, for the proposed purpose of fixing the liability upon the company, he having been discharged from the employment of the company, to show malice and

ill-feeling on the part of Reilly. The evidence thus offered was objected to by plaintiff's counsel as immaterial, irrelevant and collateral, and the objection was sustained and the evidence excluded. In this ruling the counsel for the appellant claims there was error, and we are of that opinion. The credibility of Reilly as a witness was one of the questions to be determined by the jury. It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party, and so it has been held in many cases. (*Starks v. The People*, 5 Den. 106; *Newton v. Harris*, 6 N. Y. 345; *Hotchkiss v. Germania Fire Ins. Co.* 5 Hun, 91; *Starr v. Cragin*, 24 id. 178; *Long v. Lamkin*, 9 Cush. 365; *Collins v. Stephenson*, 8 Gray, 441; *Drew v. Wood*, 26 N. H. 363; *Hutchinson v. Wheeler*, 35 Vt. 340; *Atwood v. Welton*, 7 Coon. 71; *Gale v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 595.) In *Starks v. The People*, Starks was indicted in the General Sessions of Oswego county for burning the barn of Perkins, and upon the trial Perkins was sworn as a witness for the prosecution. On his cross-examination he was asked whether he did not, during the then last winter or spring, when speaking to one Dunton and referring to a certain black ash swamp, say "there would be a good place to kill Starks," and he answered that he had not so stated. Dunton was afterward called on the part of the prisoner, who offered to prove by him that during the then last winter or spring, before the burning of the barn, Perkins, speaking to him of the black ash swamp, did say it would be a good place to kill Starks. The district attorney objected to the evidence so offered as irrelevant, and because the declaration offered to be proved was made prior to the burning of the barn, and the court sustained the objection and excluded the evidence. The prisoner was convicted. The Supreme Court reversed the conviction and granted a new trial, holding that the evidence was competent and should have been received to show hostility or malice on the part of the witness toward the prisoner. In *Newton v. Harris*, it was held, as stated in the head-note, that upon "cross-examination a witness may be questioned as to the statements made by him indicating feelings of hostility to the party against whom he is called, and if he denies making such statements, they may be proved by other witnesses." In *Gale v. N. Y. C. & H. R. R. R. Co.* (76 N. Y. 594), it is said that "it is not disputed that it is competent to show that a witness who has testified against a party is hostile to such party, and this may be shown by the witness himself or other competent evidence in contradiction of him." In 1 *Greenleaf's Evidence* (§ 450, Redfield's ed.) it is said: "It has been held not irrelevant to the guilt or innocence of one charged with a crime, to inquire of the witness for the prosecution, on cross-examination, whether he has not expressed feelings

of hostility toward the prisoner. The like inquiry may be made in a civil action, and if the witness denies the fact, he may be contradicted by other witnesses." Inquiry into the state of the feelings of a witness toward either party is not collateral, and may always be made. The evidence to show the hostile feeling of a witness when it is alleged to exist should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issues in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred. Here the proof offered was direct and positive. Reilly was a witness for the plaintiff to establish the liability of the defendant for an accident causing injury, and here was an offer to show that he had before endeavored to procure a witness to testify falsely in order to fasten a liability upon the defendant. If the offer had been to show that he had endeavored to suborn a witness to testify falsely against the defendant in this action, no one can doubt that the evidence would have been competent for the purpose of showing hostility and ill-will toward the defendant. And the fact that he endeavored to procure a witness to swear falsely against the defendant in some other case is just as competent and substantially as potent to show the same hostility.

We think the evidence should have been received, and for the error in rejecting it the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except Tracy, J., absent.

Judgment reversed.

See *East Tennessee, etc., R. R. Co. v. White*, 8 Am. and Eng. R. R. Cas. 65.

BONHAM

v.

CHARLOTTE, ETC., R. R. Co.

(16 *Shand (S. C.) Reports*, 633. March 11, 1882.)

The evidence in the case held to show that cotton packed in bales was classified by common carriers as a heavy article and not as an article of measurement.

UPON the return of this case to the Circuit Court after the judgment rendered on the former appeal (13 S. C. 267, 3 Am. & Eng. R. R. Cas., 302), it was referred to the Master to inquire and report whether cotton packed in bales was classified as a heavy article, or as an article of measurement, according to the custom in

practice with railroads and common carriers in South Carolina in December, 1846 (the date of the charter). The master took testimony, and reported that cotton was classified by common carriers in December, 1846, as a heavy article. This report was confirmed by Judge Pressley, who gave judgment perpetually enjoining the defendant from transporting cotton in bales otherwise than as a heavy article, subject to the tolls allowed by its charter for the carriage of heavy articles.

On appeal, this judgment was affirmed, no manifest error being shown in the concurrent finding of fact by Master and Circuit Judge. There was no evidence to show that cotton packed was ever classified as an article of measurement, most of the witnesses stating that its transportation in 1846 was charged by the bale, but a bale was explained to mean a certain number of pounds of cotton, and not a package of so many cubic feet. "The standard by which the railroad determined its rate was the weight and not the size of the bale." One witness, however, who was a director in 1852, testified that cotton was charged as a heavy article. Opinion by McIver, A. J., March 11, 1882. J. H. Rion, for appellant. Youmans, Attorney General, J. T. Rhett, contra.

SOUTH AND NORTH ALABAMA RAILROAD COMPANY

v.

WOOD.

(66 *Alabama Reports*, 187.)

The undertaking of a common carrier, as a general rule, includes the obligation to deliver the goods safely, at the place of destination, either to the consignee, or to his authorized agent; but, in the case of railroad companies, by universal custom, personal delivery to the consignee or his agent is not required.

As to the necessity of notice to the consignee, of the arrival of the goods at the place of destination, there is a conflict in the authorities; but the preponderance of the decisions, contrary to the ancient rule, absolves railroad companies from the duty of giving special notice.

Where a railroad company has an agent or depot at the place of destination, the rule governing its liability, both as a common carrier and as a warehouseman, for goods received for transportation, is correctly stated in the case of *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209.

A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot nor agent; and when the consignee is fully advised, at the time of shipment, that the company has no depot nor agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at that place, the

liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman.

The liability of a common carrier, for goods received for transportation, is not confined to losses or injuries resulting from the negligence of himself and his agents, but extends to and includes, in the absence of a special stipulation limiting it, every loss or damage which is not caused by the act of God, or of the public enemy.

In an action against a common carrier, for a damage or injury to goods received by him for transportation, the general rule is, the damage or injury being shown, that the *onus* is on the carrier to show that his liability terminated before the loss or damage occurred.

In an action against a railroad company as a common carrier, for the failure to deliver a quantity of corn received for transportation, the quantity received being a material question, the person who delivered it for the plaintiff having testified to the quantity, as ascertained from the number of barrels and the quantity of shelled corn measured out of one barrel; he may state, as a fact corroborating his measurement and calculation, that he afterwards filled the same barrel with corn out of the same crib, and again measured it out, with the same result as before.

APPEAL from the Circuit Court of Blount.

This action was brought by Edmund A. Wood against the appellant, a domestic corporation, and was commenced before a justice of the peace on the 12th of July, 1876. On appeal to the Circuit Court, the plaintiff there filed a complaint, claiming "seventy-five dollars as damages for the failure to deliver certain goods, the property of the plaintiff, viz., seventy-four bushels of corn, received by said defendant as a common carrier, to be delivered to L. K. Moss, at Jemison Station, Alabama, for a reward, which the defendant failed to do." The defendant pleaded the general issue, "in short by consent," with leave to give any special matter in evidence; and the cause was tried on issue joined on this plea. On the trial, as appears from the bill of exceptions, the plaintiff testified that he bought three hundred bushels of corn in January, 1876, from one Y. C. Copeland, near Blountsville, and employed said Copeland to deliver it for him on a car belonging to the defendant, on the switch at Bangor, consigned to L. K. Moss, at Jemison Station; that he was present at Bangor when the last load was delivered on the car, and saw the car locked securely by the depot agent at that place; that he prepaid the freight, as required by the agent, amounting to \$40; "that he did not see the corn measured, but the car was two-thirds full or more when the corn was all in;" and "that he was told by defendant's said agent at Bangor, before the corn was shipped, that Jemison was a mere 'flag station,' at which the company had no agent." Said Copeland was then introduced as a witness for plaintiff, "and testified that in January, 1876, he sold plaintiff three hundred bushels of corn; that he saw part of the corn measured; that it was ordinarily well shelled, and good, sound corn; that it was measured in a tub, or barrel, which was afterwards shucked and shelled out, and the

shelled corn measured by him in a half-bushel, a peck, and a half-peck measure; that the barrel measured out a bushel, a peck, and one-half peck nearly; and that the half-peck was not taken into the count. Plaintiff asked this witness whether, after he heard the corn had fallen short, he and W. W. Copeland and G. C. Montgomery, agent for plaintiff, did not take the same barrel, and re-measure it out of the same corn then remaining in the crib; and if they did not fill the barrel as in the first instance; and if so, to state whether the measure held out with the first measure; to which question the witness answered that he did, and that the measure held out. To this question and to the answer thereto the defendant objected; and said objections being overruled defendant excepted."

Other witnesses for the plaintiff testified to facts showing the measurement and quantity of the corn delivered. Moss, the consignee of the car, testified that the car was not more than half full when delivered to him, and that it measured only two hundred and twenty-five bushels. The corn was in good condition when delivered to Moss, and the car did not appear to have leaked, or to have been broken open, or otherwise injured. Evidence was adduced on the part of the defendant tending to show that a car when full would not hold more than two hundred and eighty-five bushels; and one witness, who testified as an expert, "made a mathematical calculation in the presence of the jury," as to the capacity of a car of the specified dimensions, showing that, "if the car was but two-thirds full, there was not more than about two hundred and twenty-five bushels." The delivery of the corn on the car was completed on the 19th or 20th, January, and the car was delivered to said Moss, the consignee, as he testified, "on the switch at Smith's Mills, some two miles north of Jemison, some ten days after the corn was shipped." Moss testified, as a witness for the plaintiff, "that Musgrove, the depot agent at Bangor, told him he could not *bill* the corn to Smith's Mills, because there was no station there, but would write to Mr. Meeks, the superintendent, and try to have it stopped there; that said agent told him also that Jemison was a mere 'flag station,' and the defendant had no agent there; that he (witness) never went to Jemison for the corn, and could not say when it arrived there." Said Musgrove, the depot agent at Bangor, a witness for defendant, "testified that he told plaintiff and said Moss, the consignee, that he would write to Mr. Meeks, the superintendent, to have the car put off at Smith's Mills; that this could only be done by the permission of the superintendent; also, that the car and freight was *billed* to Jemison, and that he turned over the car containing the corn on the 22d January to J. K. Britt, conductor of a freight train on the defendant's road, to be carried to Jemison." Said Britt, also a witness for the defendant, testified "that he examined the car contain-

ing plaintiff's corn, as it was his duty to do when he received it, and found the same in good order, and carried it direct to Birmingham, where the same was then checked off, and in forty minutes after his arrival there saw the said car in one of the defendant's trains, in charge of a conductor on the road, move off in the direction of Jemison."

This being the substance of the evidence, all of which the bill of exceptions purports to set out, "the court charged the jury, of its own motion, as follows: "1. That if the jury believed from the evidence that the plaintiff delivered three hundred bushels of corn to the defendant, to be shipped from Bangor to Jemison, or any other place on the line of defendant's road, defendant must account for the same; and if he fails to do so, plaintiff is entitled to recover in this action. 2. That it was the duty of the defendant to retain the car of corn at the station or place to which it was shipped, until called for by plaintiff or the consignee, at the defendant's risk; or to retain the same for a reasonable time, and if the plaintiff or consignee failed to apply for the freight in such time, then the defendant could sell the same, and out of the proceeds thereof pay itself for its care and attention in keeping the same. 3. That the jury might infer from the evidence that, during the time elapsing between the time the corn was shipped at Bangor and the time it was delivered to the consignee, that it was at Jemison, Tuskaloosa, or anywhere else. 4. The court stated to the jury, also, that they might infer from the evidence, if they thought proper, that some of the corn was taken at Bangor, while being loaded, or before it was removed from Bangor, or after it reached Jemison, or the place to which it was shipped."

The defendant excepted to the second and fourth of the charges thus given, and requested the following charges, which were in writing: 1. "To entitle the plaintiff to recover in this suit, he must show that he delivered to the defendant a greater amount of corn than the defendant delivered to Moss, the consignee, and that such failure was on account of the negligence of the defendant, or of the defendant's agents." 2. "If the defendant delivered the freight car at Jemison, or on the side track at such station; if they find from the evidence that the company had no agent at said station, and that this fact was known to plaintiff, and so understood by him; then it was the duty of the consignee to receive his freight, and the liability of the company closed; and if the corn was lost after that time, then it is the loss of the plaintiff, and the defendant is not liable for such loss or destruction." The court refused each of these charges, and the defendant excepted to their refusal.

The refusal of the charges asked, the giving of the charges excepted to, and the admission of the evidence of Copeland, to which objection was made, as above stated, are now assigned as error.

Thos. G. Jones, with whom was J. W. Inzer, for appellant, cited *McMaster v. Penn. R. R. Co.*, 69 Penn. St. 374; *Lemke v. Chicago R. R. Co.*, 39 Wis. 453; *Hedges v. Railroad Co.*, 49 N. Y. 246; *Richardson v. Goddard*, 23 How., U. S. 28; *Railroad Co. v. Campbell*, 12 Indiana, 55; *Stone v. Rice*, 58 Ala., 95; *M. & G. Railroad Co. v. Prewitt*, 46 Ala. 63.

C. F. Hamill, contra cited *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *M. & G. Railroad Co. v. Prewitt*, 46 Ala. 63; *Southern Express Co. v. Armistead*, 50 Ala. 350; *M. & O. Railroad Co. v. Hopkins*, 41 Ala. 486; *Jones v. Pitcher & Co.*, 3 Stew. & P. 135; *Ward v. Reynolds*, 32 Ala. 384; *Stone v. Watson*, 37 Ala. 279; *Buchanan v. Collins*, 42 Ala. 419; *Johnson v. West*, 43 Ala. 689.

SOMERVILLE, J.—This is an action brought by the appellee against the South and North Alabama R. R. Co. for the failure to deliver a car-load of corn, received by the said company for transportation by it as a common carrier. There is no count in the complaint, seeking to charge the company on the ground of negligence in the custody of the goods, in its capacity as a warehouseman.

As a general rule the undertaking of a common carrier to transport goods to a particular destination, includes the obligation of a safe delivery of them to the consignee, or his authorized agent. And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God, or the public enemy.—*Angell on Carriers*, § 282; *Fitchburg, etc., R. R. Co. v. Hanna*, 6 Gray, 539; *Heineman v. Grand Trunk Ry. Co.*, 31 How. (N. Y.) 430.

In the case of railroad companies, universal custom seems to have settled it, as being the more reasonable rule, that a personal delivery to the owner, or consignee, is not required. Their routes are, in a measure, permanently fixed, and cannot be easily varied to suit the convenience or accommodation of the public. Their cars and locomotives run on certain lines, or tracks, from which they can not deviate; and it is, therefore, implied that they shall deliver, either at the termination of their routes, or at fixed intermediate stations. *Hutchinson on Carriers*, § 367. And, although the authorities are greatly conflicting on the question of notice, there seems to be a preponderance of the decisions favoring the proposition that no obligation rests on railway carriers to give special notice of the arrival of goods to the person to whom they are consigned. This is not in accordance with the ancient rule governing common carriers generally; and its establishment seems to furnish a fresh illustration of that wonderful and plastic power of the whole system of the common law, to mould itself to the

rapid growth of modern commerce, and the new phases of an advancing civilization.

It is not unreasonable, in such cases, to assume that the consignee has been already advised by the consignor of the fact that the goods have been forwarded to him. It would, too, be practically impossible to require such notice to each consignee, where the arrivals of goods by this mode of transportation are so frequent and various, as is the case in populous emporiums of commerce and the great centres of railway traffic. *Redfield on Car.* § 110; *Hutchinson on Car.* §§ 367-68.

These principles apply where the carrier has an agent or depot at the point of destination. The rule governing the liability of railroad companies, in such cases, whether as common carriers or as warehousemen, is properly stated by this court in the case of *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala 209; and it is unnecessary for us here to reiterate it.

In the present case, as shown by the evidence, it was distinctly understood, at the time of the shipment of the corn in controversy, that the South and North Ala. R. R. Co. had no agent at "Jemison Station," which was a mere "flag station," to which the carload of corn was consigned. It was equally well made known that there was neither agent nor station at "Smith's Mills," where it was agreed that the corn might be delivered. The question presented for our decision is, Did the safe delivery of the car, containing the corn, on the side-track at a station where it was agreed to be received, terminate the liability of the railroad company as a common carrier?

The law does not require of railroad companies the absolute duty to construct or keep warehouses at every station along their route of travel or transportation. They are required only to do the best their means will enable them to do, under existing circumstances, and must act in accordance with the reasonable necessities of their usual business. *Red. on Car.* § 120. We can see no reason why a railway company, acting as a common carrier, cannot stipulate, by a contract express or implied, that their liability as a carrier shall terminate with a delivery at a particular point, and that they will assume no liability at all, in such case, as warehousemen.

If the consignee is fully advised, at the time of shipment, that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business.

The delivery of the car-load of corn on the side-track at "Smith's Mills" terminated the liability of appellant. It would be unreasonable to require the railroad company to employ a special agent to keep the corn in further custody, unless there was an agreement, express or implied, to do so. When the consignee was informed that there was no agent of the company there he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment, after such knowledge, was an assent, on the part of the shipper, to the implied conditions. *Wells v. Wilmington, etc., R. R. Co.*, 6 Jones (N. C.) 47.

The case of the *Southern Express Co. v. Armistead*, 50 Ala. 350, is not in conflict with these views. That was a delivery by an express company, which is, ordinarily, required to be a personal delivery. Such companies may, in fact, be justly said "to owe their origin to the modification of the law in regard to the delivery of goods in favor of water carriers and railway companies." *Hutch. on Car.* § 379. That decision was, furthermore, based on the ground, that the evidence failed to show any contract, express or implied, waiving a personal delivery.

For the reasons above given, the second charge given by the Circuit Court was clearly erroneous.

The first charge requested by appellant was properly refused. It was vicious, in assuming that the liability of the railway company depended on its negligence, or that of its agents. Being a common carrier, the road in the absence of a special contract limiting its common-law liability, was an insurer against every loss or damage, except that occasioned by the act of God or the public enemy. It is obnoxious to the further objection that it fails to recognize the duty of exculpation, which is always cast on common carriers, where a damage or injury is shown in the case of goods delivered to them for carriage. In such cases, the general rule is, that the onus of proof is always on the carrier, to show that his liability terminated before the loss or damage in question occurred. *Redfield on Car.* § 113; *Wardlaw v. South Car. Railway*, 11 Rich. Law, 337.

The question to the witness Copeland, and his answer, were relevant, and properly admitted. The evidence thus elicited tended to show the amount of corn delivered to appellant for transportation. The experiment of measuring out some of the same corn, with the same barrel originally used, was proper, to test the capacity of the vessel used, and the consequent accuracy of the first measurement.

Reversed and remanded.

See note 7 Am. & Eng. R. R. Cas. 404.

CHARLES CHAFFE ET AL.

v.

MISSISSIPPI AND TENNESSEE RAILROAD CO.

(59 *Mississippi Reports*, 182.)

A debtor who ships cotton through a common carrier to his factor and creditor for sale and application to the debt, and sends the bill of lading, may afterwards change the shipment to another person without making the carrier liable to the first consignee.

APPEAL from the Circuit Court of Grenada County.

The appellants, commission merchants in New Orleans, La., agreed with S. Barbee, a store-keeper in Mississippi, that they would advance him money at a specified interest and commissions during the year 1880, and that he should ship them cotton, which was to be sold by them for his account, and the proceeds applied to its payment. Advances were made and cotton shipped accordingly, and, on January 31, 1881, he owed them one hundred dollars. On that day he delivered to the appellee's agent the two bales of cotton in controversy, which were loaded on the cars for transportation to New Orleans, to be disposed of under the contract, and took and mailed to the appellants with a letter of advice, as was his custom, this receipt:

"Mississippi and Tennessee Railroad, Oakland Station, January 31, 1881.

"Received of S. Barbee the following packages or articles, marked as per margin, in apparent good order:

Marks and Destination.	Description of Articles.	Freight.	Rate.	Condition.
S. B. 107 and 108. Chaffe, Hamilton & Powell, New Orleans, La.	Two (2) B. C.			

"W. H. CRENSHAW, Agt.

The freight by the agreement was to be paid by the appellants and charged to Barbee's account. Afterwards, Barbee, who, it is admitted, had no actual intention of transferring the title or parting with control, applied to the agent to change the destination of the cotton, and threatened to take legal process if he refused. The agent, therefore, shipped the cotton to Barbee's factors in Memphis, although he knew that the receipt had gone to New Orleans. Barbee received the proceeds of sale from his Memphis merchants, and soon afterwards he became insolvent and made an assignment.

The appellants had made no specific advances on these two bales of cotton, and gave Barbee no credit on his account. They, however, brought suit for the conversion of the cotton against the railroad company, which defeated a recovery in both the Justice's and the Circuit Courts.

J. J. Slack, for the appellants.

On delivery of the cotton to the carrier, which was the consignee's agent, the factor's lien attached, and its destination could not afterwards be changed by the consignor. *Wade v. Hamilton*, 30 Ga. 450; 1 *Parsons on Contracts*, 70, 100; 3 *Parsons on Contracts*, 261. The legal presumption is that title vests in the consignee as soon as the shipment is made. *Bailey v. Hudson River Railroad Co.*, 49 N. Y. 70; *Hutchinson on Carriers*, §§ 104, 106, 136. Advances were made to Barbee, who agreed to ship this cotton, and when he sent the bill of lading to the appellants, the title vested in them. *Bailey v. Hudson River Railroad Co.*, 49 N. Y. 70; *Burritt v. Rensch*, 4 McLean, 325; *Arbuckle v. Thompson*, 37 Penn. St. 170. This is unlike the case of a general shipment without an agreement, and for the proceeds of which the consignor is to draw. *Bonner v. Marsh*, 10 S. & M. 376; 2 *Kent Com.* 645.

E. C. Walthall, for the appellee.

The cotton in this case was the property of the shipper. *Bonner v. Marsh*, 10 S. & M. 376; *Dickman v. Williams*, 50 Miss. 500; *Wolfe v. Crawford*, 54 Miss. 514; *The Frances (Irvin's Claim)*, 8 Cranch, 418. Consignees have prima facie the right of possession, and may maintain replevin when the carrier has the goods and refuses to deliver. *Butler v. Smith*, 35 Miss. 457. But when the consignor is known to the carrier to be the owner, his right to control is clear. *Southern Express Co. v. Dickson*, 94 U. S. 549; *Halsey v. Warden*, 25 Kansas, 128. No principle of estoppel applies to this case growing out of the shipping receipt being issued and forwarded to the consignees. If on the faith of the shipping receipt the consignees had parted with anything, or had suffered any loss on account of its having been issued, it would be different. *Armentrout v. St. Louis Railway Co.*, 1 Mo. App. 158.

W. P. & J. B. Harris, on the same side.

Shipments of cotton to commission merchants to be sold and the proceeds applied to pay advances made by them, differ from sales of goods and their shipment in accordance with the orders of the purchaser and also from consignments of goods in payment of advances made specifically upon the things consigned. In the latter cases the consignee is the owner from the moment of shipment; but, in the former, the commission merchant, even after he actually receives the cotton, is a mere agent to sell it, with, at best, a factor's lien for his advances, which does not attach until the

cotton comes into his hands. *Bonner v. Marsh*, 10 S. & M. 376; *Dickman v. Williams*, 50 Miss. 50. The shipper, as the owner of the goods, has power to change their destination. *Hutchinson on Carriers*, § 337. General custom governs in this matter. Cotton is always shipped at the consignor's risk, and sold as his. He pays the insurance, and if it is damaged or destroyed uninsured, the commission merchant never sustains the loss. Decisions from States in which the course of business is different have no application in cases of this character, which must be governed by our own precedents.

CHALMERS, C. J.—It is quite generally agreed that where the seller of goods delivers them to a common carrier to be transported to the purchaser, the goods are considered as delivered to the purchaser in the absence of exceptional circumstances showing a contrary intention. Whether the same rule obtains where goods are forwarded through a common carrier by a principal to his factor for sale, and for the purpose of liquidating an existing indebtedness, is a question on which the authorities are divided. It was held in the case of *Bonner v. Marsh*, 10 S. & M. 376, that even where a bill of lading had been made out in the name of the factor and forwarded to him, and the object was to pay off the debt of the consignor to the consignee, a delivery to the carrier was not a delivery to the consignee, and that the property was liable in the hands of the carrier to attachment by the creditors of the consignor; and the doctrine was re-affirmed in the much later case of *Dickman v. Williams*, 50 Miss. 500. In both cases the question received careful consideration, and, though it seems to have been held otherwise in other States, we will adhere to our decisions on the subject. It is after all, as all the authorities agree, very much a question of intention, and perhaps the actual intention of the parties is quite as often one way as the other. In the case in hand it is admitted that there was no intention of transferring the title, or of parting with the control over the cotton shipped, except so far as the law will deduce it from the fact of shipment, and the making out and forwarding of the bill of lading. It is to be observed that in neither of the cases cited, nor in the one at bar, does it appear that the bill of lading had come to the hands of the consignee, though in all the cases it had been forwarded to him.

Affirmed.

THE MEMPHIS, KANSAS AND COLORADO RAILWAY COMPANY.

v.

WILLIAM KOCH.

(Advance Case, Kansas.)

In an action brought by K. against the M., K. & C. Railway Company, for labor performed by M. for the railway company, it was shown that M. had a valid claim against the railway company for labor performed by him; that he sold the claim to K.; and that K. gave notice to H., who was agent for the railway company, of his K.'s purchase of the claim, and demanded that H. should pay the debt to him, K. The evidence introduced on the trial also tended to show that H. was in charge of the depot and business of the railway company at Parsons; that he was the only agent of the company stationed in Labette County, and that the company had no general office in Kansas except at Parsons, and also that H. paid the employees of the railway company. The evidence also tended to show that afterward H. paid the claim to M., instead of to K.; *Held*, that the evidence was sufficient to authorize the trial court to find, as it did, that H. was such an agent of the railway company that notice to him by K. of the purchase of the claim by K. from M. was a sufficient notice of such purchase to the railway company.

ERROR from Labette County.

The opinion of the court was delivered by VALENTINE, J.

This was an action brought by William Koch against the Memphis, Kansas and Colorado Railway Company for labor performed by Patrick Monroe for the railway company, in the month of August, 1880. The judgment in the court below was in favor of Koch and against the railway company, for the amount of the claim, \$34.80 and costs, and the railway company now asks to have such judgment reversed.

It appears from the evidence that the claim of Monroe against the railway company was a valid and subsisting one; that Koch purchased the same from Monroe and took a power of attorney from Monroe authorizing Koch to collect the claims from the railway company. It also appears that Koch gave notice to H. H. Henderson, an agent of the railway company at Parsons, Kansas, of Koch's purchase of the claim from Monroe, and also of his possession of the power of attorney to collect the claim. Afterward, Henderson paid the debt to Monroe and he, as well as the railway company, then refused to pay the debt to Koch, and Koch then commenced this action for the recovery of the debt.

The only question now to be considered is whether the notice was given by Koch to Henderson of his Koch's purchase of the claim from Monroe, was a sufficient notice of the same to the railway company. In other words, was Henderson such an agent of the railway company that such a notice would bind the company?

The evidence with respect to this question, or so much of it as is necessary to refer to, is as follows: Koch testified in his own behalf, and stated among other things as follows:

I took the power of attorney down to H. H. Henderson, he has charge of the depot and business of the company here in Parsons. He is the only agent stationed in this county. They have no general office in this State, except this.

Mr. Henderson paid off the men, the same as Pat Monroe, with the checks of the company.

The men who were building the road went to Mr. Henderson and got their pay on pay-day.

On the morning of the 9th of September I handed this power of attorney to Mr. Henderson and asked him to make the payment to me instead of Mr. Monroe. He said "the checks for the payment of the men hadn't come in yet." He said I had better send the order up to the paymaster at Kansas City so that they might make out the check to me instead of to Monroe.

"I will try and do so," I said, "but will see my attorney, Mr. Ayers, first; and I want you to be sure and hold the check for me if it comes." He said "Yes, sir; all right." Koch also testified that in a subsequent interview between these same parties Henderson said that he had already received the check and handed it over to Monroe."

A. H. Ayers, the plaintiff's attorney, also testified that at a conversation had between himself and Henderson and Koch, prior to the payment of said claim, Koch requested Henderson to deliver the check only to the plaintiff, if sent to him, Henderson; and that he, Ayers, understood Henderson to promise so to do. And Ayers further testified that after Henderson had paid Monroe, that he then stated that he had given the check to Monroe because he, Henderson, had learned that part of the pay that Koch had given for it was beer. This was substantially all the evidence upon this subject that was introduced on the trial. On the hearing of a motion for a new trial, however, made by the railway company, W. C. Perry, one of the attorneys for the railway company, filed his affidavit, stating, among other things, that he, Henderson, paid the money to the principal instead of to the attorney. A. H. Ayers also filed his affidavit upon the hearing of this same motion, which affidavit stated, among other things, that after the debt had been paid to Monroe, instead of to Koch, that Ayers asked Henderson why he had done so with full notice of Koch's claim, to which he replied that he had not respected Koch's claim or his power of attorney because he had learned that Koch had bought Monroe's time by paying him in part with beer, and he did not propose to sanction such practices with their men.

Upon the foregoing evidence introduced on the trial, the court below found in favor of the plaintiff and against the defendant;

and, therefore, necessarily found that Henderson was such an agent of the railway company that notice to him of the purchase of the claim by Koch from Monroe was sufficient notice to the railway company. Upon this same evidence and upon the affidavits filed by the respective parties, the court below overruled the defendant's motion for a new trial, and therefore must have held and found in overruling such motion the very same thing which it found and held upon the evidence introduced upon the trial. We think the evidence introduced upon the trial was sufficient to authorize the finding of the court below; and such evidence and the said affidavits were sufficient to authorize the action of the court below in overruling the defendant's motion for a new trial; or at least the evidence was not so utterly insufficient as to authorize this court to set aside the finding and ruling of the court below and to grant a new trial.

From the evidence introduced on the trial it appears that Henderson was in charge of the depot and "business" of the railway company at Parsons. That he was the only agent of the company stationed in Labette County; and that the company has no general office in this state, except at Parsons. It also appears that Henderson "paid off" the employees of the railway company with checks and that such employees received "their pay on pay-day" from Henderson; and Henderson paid the debt to Monroe, instead of to Koch, because, as Henderson believed, a portion of the consideration which passed from Koch to Monroe and which induced Monroe to transfer his claim to Koch was nothing but that supposed worthless article of drink usually denominated "beer."

Of course, the evidence is not very satisfactory. It would seem that Henderson made the payments with checks of the company; and it does not appear clearly who paid these checks; but probably there is sufficient evidence from which it may be inferred that Henderson also paid the checks. The attorney in for the railway company stated in his affidavit "that he, Henderson, paid the money to the principal Monroe, instead of to the attorney" (Koch), etc. There is no evidence showing that Henderson did not pay the checks; and some of the evidence would seem to indicate that he did pay them. Probably, however, that makes but very little difference; for whether Henderson's agency was of a comprehensive character or very limited, it would still seem from the evidence that his agency was the most comprehensive and general of any agent of the railway company in Kansas; that he had power to pay all the employees of the railway company with checks, and that he had a discretion, to some extent at least, in delivering these checks; and as he delivered the check to Monroe after he had full notice of the claim of Koch, it would seem that the company should be held responsible. Of course, we are not very well satisfied with the evidence upon this point. It is somewhat doubtful whether it

shows a sufficiently comprehensive agency on the part of Henderson to make his knowledge of Koch's claim binding upon the railway company; but still the evidence is of such a character, though weak and inconclusive, that we do not think that we would be warranted in overturning the finding and ruling of the court below and in reversing its judgment for no other reason than that such finding, ruling and judgment are not supported by sufficient evidence. The judgment of the court below will, therefore, be affirmed.

All the justices concurring.

HAWKINS

v.

SMALL.

(7 *Baxter (Tenn. Reports)*, 193.)

The defendant, who was a section hand on the N. C. & St. L. R. Co., was assigned to plaintiff, who was a road overseer, to work the public roads. On being summoned by the plaintiff, the defendant refused to work, and alleged as an excuse that the railroad upon which he worked was originally the Nashville and Northwestern Railroad Company, the charter of which exempted the president, directors, clerks, agents, officers and servants from road duty. *Held*, that defendant was exempt, under the charter, from road duty, and that notwithstanding the consolidation of the Nashville and Northwestern Railroad with the Nashville, Chattanooga and St. Louis, it not appearing that the charter of the latter had been repealed, the new company took the old road burthened with the restrictions as well as protected by the terms and conditions of its charter.

APPEAL from the Circuit Court. Jas. D. Porter, Judge.

Attorney-General Heiskell for the State.

J. P. Wilson, for defendant.

SNEED, J.—The plaintiff, as overseer of a public road in the county of Carroll, brought this action under the statute to recover of defendant, as one of the hands assigned him, the penalty imposed by the statute for failing to work the road when summoned to do so.

The case was submitted to the judge of the court upon facts agreed, and judgment was rendered for plaintiff. The defendant appeals in error.

The defence is that the defendant was at the time a section hand on the railroad now operated by the Nashville, Chattanooga and St. Louis Railroad Company, and on that part of the same which was originally a portion of the road-bed of the Nashville and

Northwestern Railroad Company. The charter of the Nashville and Chattanooga Railroad Company contains a provision exempting the president, directors, clerks, agents, officers and servants of said company from road duty. The charter of the Nashville and Northwestern Railroad Company contains a similar provision.

But it is urged that the defendant is not protected under either, because the new consolidation of the Nashville and Chattanooga and the St. Louis Railroad Company, now own and operate that portion of the road-bed of the Nashville and Northwestern Railroad Company where the defendant was operating as a section hand. It is not shown that the provision of the charter referred to has ever been repealed or abrogated by any subsequent charter to the consolidated corporation now holding the road by purchase, and operating the same.

We hold, therefore, that the new company, under its purchase, took the old road burthened with the restrictions as well as protected by the terms and conditions of its charter. It was perfectly competent for the Legislature to exempt this class of persons from road duty, and it was a wise exercise of legislative discretion. A section hand is an important personage in railroad economy in the protection of human life as well as the property of the people. He is a servant of the company in the sense of the charter.

Reverse the judgment and dismiss the case.

W. A. ELIASON

v.

THADDEUS COLEMAN.

(86 *North Carolina*, 285.)

The office of chief engineer of the Western North Carolina Railroad is not a public office. The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a *quo warranto* only will lie to recover the same.

(*Ellis v. D. D. & B. Inst.*, 68 N. C. 428; *Norfleet v. Staton*, 73 N. C. 546; *Patterson v. Hubbs*, 65 N. C. 119; *Clark v. Stanley*, 66 N. C. 59; *Howerton v. Tate*, 68 N. C. 547; *Nichols v. McKee*, *Ib.* 429; *Welker v. Bledsoe*, *Ib.* 457; *R. R. Co. v. Davis*, 2 Dev. & Bat. 451, cited, commented on and approved.)

CIVIL ACTION tried at Fall Term, 1881, of Iredell Superior Court, before Seymour, J.

This action is brought to recover so much of the salary of the chief engineer of the Western North Carolina railroad company as was received by the defendant for services while in possession

of the office and in discharge of its duties, for the period immediately preceding his retirement therefrom in June, 1872. The company was organized under an act of the general assembly passed in 1855, the substance of which, so far as it affects the present controversy, may be thus summarily stated: The management of the affairs of the company is committed to a general board consisting of twelve directors, of whom eight were to be appointed by the Governor with the advice and consent of the Senate, and the others elected by the individual stockholders. The directors, who must be citizens of the state and resident therein, and also hold each at least five shares of the capital stock, are required to elect one of their number president of the company. Contracts authenticated by the president and secretary of the board of directors are made binding upon it. With the exception of the commissioners designated by name to open books of subscription to the capital stock, no other officers of the corporation are created or expressly recognized in the act. Acts 1854-55, ch. 228.

The concluding paragraph of section 6 confers among other rights and immunities the authority to "make all such by-laws, rules, and regulations as are necessary for the government of the corporation, or for effecting the object for which it (the company) is created, not inconsistent with the constitution and laws of the State."

At a meeting of stockholders held in August, 1869, an ordinance or by-law was adopted in these words: "The following are declared officers of the company, to wit—the president, directors, secretary, treasurer, superintendent, and chief engineer. All other persons whose services shall be necessary shall be considered as employees." Another ordinance or by-law declared that the chief engineer should hold his office for one year and until his successor is duly elected and qualified, and fixed his salary at \$2000 per annum. The plaintiff was appointed to this place in November, 1869, and again on the 13th day of that month, in the year following.

In February, 1871, was passed an act, as its title declares, "for the benefit of the Western North Carolina railroad company," conferring upon the stockholders the right to remove the then acting directors, and any of the agents or officers of the company, and to appoint others in their place, and in the event of such removal, designating the state directors by name. Under this act the stockholders met on April 4th, 1871, and after organization against the written protest of the plaintiff proceeded to remove him and elected the defendant to the vacated place of chief engineer, to serve until their next annual meeting. The defendant entered upon the discharge of his official duties and continued to discharge them up to the time of his resignation. For his services during this period he received the stipulated compensation,

amounting to \$2,338.74, the last portion of which was paid in February, 1873.

Upon this showing His Honor intimated an opinion that the position of chief engineer was not such an office as to give the plaintiff a tenure and vested right thereto, and he could not maintain the action. The plaintiff, in submission thereto, suffered a non-suit and appealed.

Messrs. J. M. Clement and D. M. Furches, for plaintiff.

Messrs. J. M. McCorkle and W. R. Henry, for defendant.

SMITH, C. J., after stating the case: The only question therefore before us is as to the correctness of this ruling. We are not required to decide upon the redress which the plaintiff may have against those who displaced him, or the corporation for which they professed and undertook to act in disregarding the conditions of the contract, as to the term of service and rate of compensation involved in the ordinance in force, and entering into the contract when the election was accepted. Nor is it necessary to consider and determine the legal effect upon the defendant's right to the office, as the appointee of the stockholders, *de facto* if not *de jure*, representing the corporation by virtue of an unconstitutional enactment in making the appointment.

The principle governing in such cases is clearly laid down in the cases of *Ellis v. N. C. Inst. for Deaf, Dumb, and Blind*, 68 N. C. 423, and in *Norfleet v. Staton*, 73 N. C. 546, with a mere reference to which we are content, for the reason that the ruling under review is entirely independent of those decisions.

The inquiry is this: Can the plaintiff recover the salary or fees received by the defendant for personal services rendered as chief engineer to the corporation? Has the defendant taken and converted to his own use moneys belonging to the plaintiff, and for which the action for money had and received will lie?

We concur in the view taken by his Honor, and for the satisfactory reason he assigns. The controversy does not hinge upon the meaning given to the words, "office and officer," as designating corporate agencies of a higher grade than those denominated employees who are serving their employers under contract.

But is the office of chief engineer of a railroad corporation, created by itself and for its own convenience, such an office as entitles one who has been displaced to recover its possession from the incumbent, and has he a vested estate in it with the right to all its emoluments and fees by whomsoever received as compensation for his own personal services? The subject has been heretofore before the court, and the following have been held to belong to this class:

1. A tax-collector. *Patterson v. Hubbs*, 65 N. C. 119.

2. The presiding officers of the two houses of the legislature in

exercising a power conferred upon them as such to appoint proxies and directors in corporations in which the State has an interest. *Clark v. Stanley*, 66 N. C. 59; *Howerton v. Tate*, 68 N. C. 547.

3. The directors of the asylums for the Insane and the Deaf, Dumb and Blind, of the Penitentiary, and the trustees of the University. *Nichols v. McKee*, 68 N. C. 429; *Welker v. Bledsoe*, *Ib.* 457.

4. The president of this railroad who brought his action, and it was sustained in *Howerton v. Tate*, *supra*.

These cases come within the purview of section 366 of the Code, which authorizes the Attorney-General "to bring an action in the name of the people of the state upon his own information or upon the complaint of any private party against the parties offending, when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state." It is manifest, as the action may be instituted by the Attorney-General "upon his own information," as well as "upon the complaint of any private party," that the act has reference to such usurping occupants as are exercising public functions or conferred franchises, wrongfully, and is confined to an office which, as is said in *Nichols v. McKee*, "is a part of the government and part of the state polity," and to an officer "who takes part in the government." "An office, such as to properly come within the legitimate scope of a quo warranto information, may be defined," says a recent author, "as a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." *High Ex. Leg. Rem.* § 620.

"The three tests to be applied in determining whether an information will lie," are in the words of the same author; "first, the source of the office; second, its tenure; and third, its duties. The source of the office should be from the crown or sovereign authority, either by charter or legislative enactment; its tenure should be fixed and permanent, and its duties should be of a public nature." So it has been held that an information will not lie to remove officers of a railroad company who hold office under an election of the directors, as these are merely agents or servants of the company removable at the will of the appointing power. *People v. Hill*, 1 *Lans.*, N. Y. 202. In *Burr v. McDonald*, 3 *Gratt.*, (Va.) 215, the court declare that the officers of a joint stock company created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless.

The plaintiff's counsel insists that inasmuch as the power to make all necessary by-laws, rules, and regulations is vested in the

company by its charter, and the stockholders have under this authority created and declared the office, limiting its duration and determining the salary, and its duties concern the public, the office partakes of a public nature and the same remedy should be afforded to the ejected incumbent to regain possession.

The right to conduct and carry on its business and to constitute the necessary agencies for that purpose, is not a delegation of authority to make one of its agents a public officer. The company is essentially a private corporation, its outlays and emoluments private property, but the road when constructed becomes a public highway, and hence land may be taken from an unwilling owner upon making compensation to him. *R. and G. R. R. Co. v. Davis*, 2 Dev. & Bat. 451.

The true test of a public office seems to be that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power.

It is only such as can avail themselves of the remedy by action under the provision of the Code superseding the former method of procedure by information in the nature of a quo warranto to recover possession of the office from which they may have been ejected that can maintain the suit for the recovery of the fees and emoluments which the usurping intruder has wrongfully received.

We therefore find no error in the record and affirm the judgment.

No error. Affirmed.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RY. CO.

v.

FIERST.

(75 *Missouri Reports*, 114.)

A railroad property and franchises were bought at judicial sale by H. and others, who subsequently, under the provisions of the Act of April 8th, 1861, organized a railway company: *Held*, that the company was not liable for the operation of the road, during the time intervening between the purchase and the organization of the company, unless the possession of the company was affirmatively shown.

The presumption was that H. and not the company was in possession of the road between the date of the sale and the time of filing the certificate of organization.

NOVEMBER 8th, 1880. Before Sharswood, C. J., Mercur, Gordon, Paxton, Trunkey, Sterrett and Green, JJ.

Error to the Court of Common Pleas, No. 1, of Allegheny County: Of October and November Term, 1880, No. 238.

Case by William Fierst against the Pittsburgh, Cincinnati & St. Louis Ry. Co. to recover damages for injuries alleged to have been caused by defendant company.

In December, 1867, Fierst was in the employ of the National Coal & Coke Company as a brakeman on their coal cars. His duty called him to serve on the train running between his employer's works, a few miles west of Pittsburgh on the line of the Pittsburgh and Steubenville R. R. and Pittsburgh. On December 21st, while engaged in his regular duties, he was injured in a collision between the train he was on and one of the freight trains of the Western Transportation Company, which was then operating the said railroad as lessees. There was no question made on the trial as to negligence, the simple question being as to whether or not the defendant company was liable in any event.

Section 1 of the Act of April 8th, 1861, Purd. Dig. 290, pl. 49, provides: "Whenever any railroad, canal, turnpike, bridge or plank-road corporation, created by or under any law of this State shall be sold and conveyed under and by virtue of any process or decree of any court of this State, the person or persons for or on whose account such railroad, canal, turnpike or plank-road may be purchased shall be and they are hereby constituted a body politic and corporate, and shall be vested with all the right, title, interests, property, possession, claim and demand in law or equity of, in and to such railroad, canal, turnpike, bridge or plank-road, with its appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation as whose the same may have been sold." The act further directs that the persons for whom the same was purchased, shall, within thirty days thereafter, "meet and organize said new corporation," first giving two weeks' public notice of said meeting.

At the trial before Bailey, A. L. J., it appeared that the defendant company was formed by the consolidation of three companies, of which the Pan Handle Company was one, and that the articles of association contained the recital "the said railroad companies, parties hereto, owning and operating these several roads." It appeared that said railroad was sold at judicial sale on November 6th 1867, to W. J. Howard and others, who received a deed therefor December 7, 1867, and that the purchasers, as required by the above Act of 1861, met to organize on December 28, 1867, and filed a certificate of incorporation as the Pan Handle Ry. Co., on January 15, 1868. The plaintiff testified that the Pan Handle Company furnished the locomotives to draw the coal cars on which he was injured, and one Brown, the conductor of the train, testified that he was in the employ of what was called the Pan Handle Ry. Co. The defendants gave evidence to show that the Western Transportation Company, under its charter, had leased and was operating the railroad at the date of the sale to Howard, and one

Card, superintendent of said Western Transportation Company, testified that the latter company was in possession of the railroad until the formation of the defendant company.

The verdict was for plaintiff for \$3250, and after judgment defendant took this writ, and made the following assignments of error:

1. The court below erred in declining to affirm the point submitted by the defendant below, which was as follows, viz.: That under all the evidence in this case the plaintiff is not entitled to recover.

2. The court erred in that portion of its charge which is in the words following, viz.: "I instruct you for the purposes of this case, that after the sale of the franchises of the road to McElrath, and afterwards to W. J. Howard, under which the Pan Handle Ry. was organized, the presumption is the Pan Handle Ry. Co. was in possession of the road and its operation at the time of this accident."

8. The court erred in submitting, as a question of fact to the jury, whether the Pan Handle Ry. Co. was in possession of the road at the time of plaintiff's injury, when there was no evidence of such possession.

Hampton & Dalzell, for plaintiff in error.—From the uncontradicted testimony on the part of both plaintiff and defendants, the Pan Handle Ry. Co. did not, in fact, injure the plaintiff. It further appears, by uncontradicted testimony, that the Western Transportation company was operating the road under lease from the Pittsburgh & Steubenville R. R., and that its possession was never interfered with until the defendant company's organization, some six months after the accident. How, then, could the Pan Handle Ry. Co., which appears to have been simply a paper company, be liable to plaintiff? The effect of the charge of the court seems to be that from the judicial sale a presumption arose that the purchaser went into possession of the property bought, but there is no presumption that the occupant went out. If the case for the plaintiff is to stand it must be upon the theory of his counsel, that the existence of the Pan Handle Ry. Co. relates back, by operation of law, to the acquisition of title by W. J. Howard. But concede that it does, does that make the company liable for a negligent act to which it was no party, happening between the time when it acquired title and the time when it was in a position to take possession? Does it make it liable apart from the question of possession? There can be no doubt that the Western Transportation Company was the party operating the road when plaintiff was injured. This company was lawfully in possession as lessee. It was not, in law, the agent of the purchaser, and according to the evidence it was not his agent in fact. There was no privity between them whereby one became liable for the torts of the other. This

case does not resemble *Wellsborough & Tioga Plank-road Co. v. Griffin*, 7 P. F. Smith, 417. The points of difference are vital.

W. W. Thompson and Slagle & Wiley, for defendants in error.

It is apparent, from the reading of the Act of 1861, that the new corporation does not take its being from the time of organization, but is in existence from the date of the sale, the powers residing in and being exercised by the purchaser in the meantime. This is a necessity of the case. There can be no suspension of such powers. Like a fee, they cannot be in abeyance and must always exist somewhere, and therefore the act provides that "the person or persons for on whose account such railroad may be purchased, shall be and they are hereby constituted a body politic and corporate." Accordingly it was held by this court, in the *Wellsburg and Tioga Plank-road Company v. Griffin*, supra, that after a sale under a similar law, "there remained no further duty for the company to perform," and that the purchaser alone was responsible for any injury occurring after such sale. See also, *Commonwealth v. Central Passenger Railway Company*, 2 P. F. Smith, 506. It follows then that the purchasers would have the power to at once take possession of the property and exercise the rights and powers of the corporation subject to its duties, and that all profits and liabilities would belong to the corporation subsequently organized in accordance with the provisions of the law; and this power being in pursuance of a public grant, it would become a duty upon the parties to exercise it. The existence and operation of the road by the Western Transportation Company would not affect this power and duty. But aside from this as the road was owned by the defendants, who had possession of all the books and papers relating to it, and who could have shown affirmatively and positively who was at the time operating the road, their failure to produce it raised a presumption that, if offered, it would be against them. *Frick v. Barbour*, 14 P. F. Smith, 121; *Brown v. Shock*, 27 Id. 478; *Bryant v. Stilwell*, 12 Harris, 317.

Mr. Justice GREEN delivered the opinion of the court, November 22, 1880.

This was an action to recover damages for a personal injury sustained by the plaintiff, whilst engaged as a brakeman in the employ of the National Coal and Coke Company, on their coal cars. In the course of his employment he was required to serve on the train running between the works of the National Coal and Coke Company, situate a few miles west of Pittsburgh, on the line of the Pittsburgh and Steubenville Railroad and Pittsburgh. No question was made on the trial as to the negligence which resulted in the injury of the plaintiff, the only question being whether the corporation defendant, in the present action, was liable to pay the damages in any event. At the time of the plaintiff's injury the

defendant had no actual existence as a corporation. It was created under the general railroad law of this Commonwealth by articles of consolidation and merger, in pursuance of the provisions of the Act of 24th March, 1865, Pamph. L. 49. The several corporations which participated in the consolidation were the Steubenville and Indiana Railroad Company, a corporation of Ohio; the Holliday's Cove Railroad Company, a corporation of West Virginia; and the Pan Handle Railway Company, a corporation of Pennsylvania. The certificate of organization of the Pittsburgh, Cincinnati and St. Louis Railway Company was dated March 17, 1868, and was filed in the office of the secretary of the Commonwealth on May 29, 1868. By the third section of the act above referred to, it is provided that upon the making and perfecting the agreement and act of consolidation, and filing the same, or a copy, with the secretary of the Commonwealth, the several corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement, possessing within this Commonwealth all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated.

The 29th of May, 1868, therefore, would be the date at which defendant became duly organized as a corporate body. By a proviso to the fourth section of the act it is declared that "all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation, and be enforced against it, to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." In the present action it is averred that the liability to pay the damages occasioned by the injury to the plaintiff was a liability of the Pan Handle Railway Company, and therefore under the above quoted proviso to the fourth section of the act, it became the liability of the present defendant, and this is the sole question in this case. It becomes necessary to consider whether the Pan Handle Railway Company was liable for the injury of the plaintiff. That company was organized in the following manner: On November 6, 1867, the Pittsburgh and Steubenville railroad was sold at judicial sale under a decree of foreclosure made by this court. The purchaser at said sale was W. J. Howard, to whom a deed was made on December 7, 1867. On December 28, 1867, W. J. Howard and those for whom he purchased the Pittsburgh and Steubenville Railroad, held a meeting to organize the Pan Handle Railway Company. On January 14, 1868, articles of association were signed, and on the next day, January 15, 1868, they were filed in the office of the secretary of the Commonwealth.

By the second section of the Act of April 8th, 1861, under which this organization was had, it is provided that a certified copy of the certificate of organization filed as aforesaid "shall be evidence of the corporate existence of said new corporation." It

is plain, therefore, that the Pan Handle Railway Company was a lawfully constituted corporation, vested with all the corporate rights and franchises of the Pittsburg and Steubenville Railroad Company from and after the 15th day of January, 1868. Under the Act of April 8th, 1861, it was held, in *Wellsborough and Tioga Plankroad Co. v. Griffin*, 7 P. F. Smith, 417, and in *Commonwealth v. Central Passenger Railway*, 2 Id. 506, that the corporate franchises of a corporation sold in accordance with the provisions of that act passed to, and became vested in, the purchaser from the time of sale. The purchaser, being authorized to organize a new company, and proceeding to perform that duty according to the requirements of the act, brings into existence a new corporate body which succeeds to the corporate rights and franchises formerly owned by the company whose property has been sold, and held after the sale by the purchaser.

In the case of *Wellsborough and Tioga Plankroad Co. v. Griffin*, supra, it was held that the old company was not liable for an injury occurring after the sale, but that the purchaser would have been so liable if in point of fact he maintained and conducted the road. In the present case it was proved on the trial, and not contradicted, that the Pittsburg and Steubenville Railroad was leased to the Western Transportation Company, by a contract dated December 30th, 1857, for the term of twenty years, which was supplemented by a new and additional agreement, dated June 3d, 1858. The Western Transportation Company was incorporated by the Act of March 15th, 1856, Pamph. L. 1857, p. 76, "with power to lease, finish, equip and operate the Steubenville railroad, for such term of years and upon such conditions as may be agreed upon with said railroad company." The lease to the Western Transportation Company included a contract by that company to finish the road and operate it. It was proved by the testimony of W. W. Card, a witness for the defence, and contradicted by no one, that he was superintendent of the Pittsburg, Columbus and Cincinnati Railroad Company, which was composed of the Western Transportation Company and the old Steubenville and Indiana Railroad Company, and that the Western Transportation Company was in possession of the Pittsburg and Steubenville portion of the line continuously during the period of his service. His service commenced in 1864 and continued until about October or November, 1871. Against this positive proof there was not a particle of testimony. Now the plaintiff received his injury on December 21st, 1867. At that time the road was in the actual possession of the Western Transportation Company. The plaintiff's right of action accrued on the day he was injured. On that day there was no such corporation in existence as the Pittsburg, Cincinnati and St. Louis Railway Company. No action of any kind could have been brought against that company at that time, and we cannot under-

stand how any legal presumption could arise that the road was in the possession of that company at that time. We can understand how a presumption would arise that the road was then in the possession of W. J. Howard, because he was the purchaser at the judicial sale of the road on November 6th, 1867. But even that presumption would be clearly rebutted by the positive and uncontradicted proof that in point of fact the road was then in possession of the Western Transportation Company. In this state of the testimony we think the learned judge of the court below was in error in refusing to affirm the defendant's point that under all the evidence in the case the verdict must be for the defendant; and also in saying that there was a presumption that the road was in the possession of the Pan Handle Company at the time of the accident. We are also of the opinion that the court was in error in submitting as a question of fact whether the Pan Handle Company was in possession at the time of the injury, when there was no evidence to that effect.

Judgment reversed, and a venire facias de novo awarded.

ROBERT COOK

v.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RY. CO.

(48 *Michigan Reports*, 48.)

Act 96 of 1859 permits the purchasers on a foreclosure sale of the track and appurtenances of a railway company to exercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure.

A statute giving clear title to foreclosure purchasers does no injustice to general creditors.

A common law action for the debt of a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness.

ERROR to Superior Court of Detroit. Submitted April 14. Decided April 21.

Assumpsit. Plaintiff brings error.

Alfred Russell for plaintiff in error. A corporation cannot without specific authority, mortgage an essentially corporate franchise, *Joy v. Plank Road Co.* 11 Mich. 155; *Meyer v. Johnston*, 53 Ala. 237; and if the franchise is mortgaged, the purchases become subject to the corporate liabilities, *Eldridge v. Smith*, 34 Vt. 484.

George Jerome and G. V. N. Lothrop for defendant in error. The franchise to be a corporation cannot be mortgaged without express authority from the Legislature, though the franchise to build, own and operate a railroad may be mortgaged under a general power. Curtis, J. in *Hall v. Sullivan R. R. Co.* (1857) U. S. Circ. Ct. Dist. N. H., 21 Law Reporter, 148; 2 Redf. Am. Ry. Cas. 621.

CAMPBELL, J.—Plaintiff sued defendant on a debt due him from the Detroit and Milwaukee Railroad Company, and based his claim of recovery on the ground that the defendant company is in law the same corporation as his debtor, and bound to pay all its debts. The debt consists of a judgment rendered February 26, 1875, for \$5000.

On the fourth day of September, 1878, Samuel Barker and six other persons purchased the franchises and property of the Detroit and Milwaukee Railroad Company, so far as the same were mortgaged by certain mortgages executed in 1855, 1856, 1860 and 1863, by the Detroit and Milwaukee Railway Company and the Detroit and Milwaukee Railroad Company; the purchase being made on foreclosure proceedings in which a decree of sale was made by the Circuit Court for the County of Wayne. The Detroit and Milwaukee Railroad Company was a reorganization on a former foreclosure sale under a similar mortgage against the Detroit and Milwaukee Railway Company.

After their purchase and on the 26th day of October, 1878, these purchasers executed a statutory declaration in accordance with the statute of 1859 (Comp. L. § 2373), whereby they declared their purpose of continuing to perform the duties and enjoying the franchises and immunities of the said railway corporation, and that they had provided the means for continuing and performing the duties and enjoying the franchises and immunities, and had provided suitable equipments for running and operating the road, and performing the duties incumbent on said corporation, and that the name by which they desired the said corporation to be called is the Detroit, Grand Haven and Milwaukee Railway Company. It was further declared that the purchasers had transferred to said corporation its railway track and appurtenances, and all the equipments necessary to run the same and perform its duties. This declaration was duly filed with the Secretary of State, and notice given to the Attorney General as required by law.

This conveyance was dated on the same day, and covered all the property and franchises.

The court below held that the corporation thus invested with these rights and franchises was not responsible for the debts of the Detroit and Milwaukee Railroad Company existing before the foreclosure.

It is claimed by plaintiff that by the method adopted by the purchasers to complete their organization, they continued the original corporation in force with all its former obligations.

The statute of 1859, entitled "An act in relation to mortgages against—preferred stock in—and the delivery of goods by railway companies" (Laws 1859, p. 252) was passed to provide for the preservation under foreclosures, of railway mortgages of the franchises of the mortgaging corporations. Until this law was passed there was no positive statute providing directly how mortgage sales should be made effective. Mortgages had been authorized of railroads, which necessarily involved the rights which could alone make them of any value, but the interests of purchasers were left to be worked out by implication, and whether perfect or not, would necessarily give rise to some disputes as to their precise quality and extent. This statute provides that if the railway track and its appurtenances of any railway corporation are sold on foreclosure, the purchasers, if they provide suitable equipments for running the road and performing the duties incumbent on it by law, and transfer to it again its track and appurtenances and necessary equipments, and make the declaration therein provided (which is in substance like the one made in this case), may issue and hold new stock in the corporation to such an amount and of such denomination as they shall deem proper, but not more than the value of the corporate property, unless additional stock is subscribed by parties able to pay for it. Provision is then made for the cancellation of the old stock and the election of officers by the new holders, and the continuance of all the former charter rights and powers. But it was further declared that the corporation should not be liable for any debts except those subsequently contracted by it, saving however all prior mortgages and liens, and leaving all property not included in the foreclosure sale liable for existing debts.

It is impossible to read this statute without seeing that the obvious purpose is to put the railway and its appurtenances sold under mortgage under the entire control of the new stockholders and their representatives, freed from all debts not secured by lien or mortgage, under the same conditions and with the same rights as if they had been the original stockholders of a road which was not burdened with debt. The law commits no injustice to general creditors by giving to purchasers a clear title to the property which they have purchased and paid for. If property were sold to a creditor under execution, it would be absurd to allow another creditor to levy on it and sell it as if it had never been sold. A mortgage would be of no value whatever if its foreclosure did not carry a title free from all claims that were no specific liens of older date on the property covered. There is certainly no equity in giving unsecured debts a perpetual priority over those which are secured; and the statute of 1859 not only does not favor any such implica-

tion, but expressly declares the purchasers of the mortgaged premises, and the organization to which it is transferred, shall not be liable to old debts. If there is such a liability it can only be raised by holding that the statute under which the arrangement is made, which assures the transfer of the corporate rights, cannot prescribe the terms of such holding so as to produce such a result.

It would seem much more natural to hold that the new arrangement failed altogether, for it is impossible with any reason to declare that the whole conditions should not stand or fall together. The statute certainly contains no provision for any continued corporate dealing with the road under foreclosure except as an unencumbered property aside from prior liens. If the defendant in this case can be recognized as subject to suit under its present corporate name at all, it must be on the statutory terms.

The only direct purpose for which the Detroit and Milwaukee Railway Company was given any franchises at all was that a railway might be maintained from Detroit to Grand Haven. The company could not have complied with its corporate duties except in the management of that road. The road and such franchises as were within the legislative design were connected. The company could not have sold the road and its appurtenances and then gone into some other business or built another road. And a sale to a purchaser who could not exercise the corporate privileges could have been of no use. When the road was authorized to mortgage its property and franchises the mortgage was meant to be effectual, and it could only be made so by assuring to the purchaser in some way the use of the franchises. Undoubtedly a corporation may own property and assets which it can deal with as any private owner could, and which are entirely independent of the ownership and management of its corporate business. It may have money in possession or due to it, and it may have other means acquired in payment of debts or otherwise, which are not intended to be used as a part of its road or appurtenances. But such property is incidental and needs no franchise to manage it. If the corporate existence remains after all of the property is disposed of which it was the entire purpose of the corporation existence to manage, it is the mere shadow of a name without any valuable significance. If the franchises pass with the mortgaged property, as they were meant to, all that is vital is thus transferred; and there is neither injustice nor incongruity in holding that the Legislature may treat the substance instead of the shadow as representing the corporate body. In the absence of legislation there might be some awkwardness in giving a precise legal definition to the new arrangement, but there could be none concerning its substantial rights. There could be no diminution of the privileges mortgaged without impairing the value of the mortgage itself as a legal security.

There would be manifest injustice in giving to the mortgagees

property not covered by their contract, and this the statute has expressly exempted. The property not mortgaged is left subject to old obligations. No statutory method has been pointed out for dealing with such assets, if there are any. It is not necessary for us now to consider this. The statute has very explicitly declared that it cannot be done by treating the reorganized company as the immediate debtor of former creditors. It does not appear that any property is in hand which was not purchased on the foreclosure. If the company is in possession of any, the trust cannot be worked out by an action in common law form on the debt.

There was no error in so holding. The judgment must be affirmed with costs.

The other Justices concurred.

M. VAN ALSTYNE

v.

HOUSTON AND T. C. R. R. Co.

(56 *Texas Reports*, 373.)

On the purchase of a railway company and its franchises under execution, the purchasers by circular-letter offered to the old stockholders the privilege of participating on equal terms in the purchase, on payment of ten per cent cash on their full paid-up stock within a specified time. Subsequently an act of the legislature released the road from forfeiture on condition that the company should restore the original stockholders who had paid for stock to all the rights they were divested of by sale; provided that if said stockholders failed to pay ten per cent on the amount of their stock within a time specified in the act they should forfeit all rights under it. A stockholder paid in the ten per cent on the amount of original stock which had been owned by him, but after the expiration of the time limited for its payment by the circular letter and the legislative act. Watered stock, under a general resolution of the company, was issued to him, eight shares of watered stock for one of old stock actually paid up, but he received no additional new stock to cover the ten per cent paid under circular letter and legislative requirement. In a suit to compel the issuance of stock cover the ten per cent paid, *held*,

That having paid up the ten per cent after the time limited by the circular letter and legislative enactment, and received new stock in lieu of his original stock, he was not entitled to recover.

See statement of case and opinion for more full explanation of case.

The law again announced that a judgment in a civil cause will not be reversed for a mere failure on the part of the court below to cover in the charge every phase of the case, when attention is not called to the omission by a charge asked or otherwise.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The following outline of the voluminous record in this case will serve to explain the questions decided in the opinion.

On April 2, 1861, the Houston & Texas Central Railway Co. was sold under execution and bid in by Hutchins & Paige, who on the next day issued a circular letter offering to the old stockholders the privilege of participating on equal terms in the purchase, on the payment in cash within six months of ten per cent on their full paid stock. By their circular letter of September 9, 1861, the time for this payment was extended until April 3, 1862.

Subsequently (but the precise time does not appear) certain articles of agreement were prepared for the basis of the organization of a new company under the old charter by Hutchins, Paige and such other of the stockholders as had made payment of this ten per cent, under the proposition of Hutchins and Paige. By the fourth article of this agreement, it was provided that the capital stock should be divided into shares of \$100 each, and that certificates should be issued for the same for the amount of stock held in the old company and the additional ten per cent paid. There was evidence tending to show that the original agreement was signed at least by some of the parties interested, and that it was the basis of the organization of the new company, but the book of the company containing the article of agreement does not show that it was signed. At that time, it would seem from the record, W. A. Van Alstyne, now deceased, and whose executrix brings this suit, had not paid in the ten per cent on his old stock.

January 10, 1862, the legislature passed an act "For the relief of railroad companies." It released them from forfeiture of their charters or lands for not extending or completing their roads in accordance with existing laws, giving them until two years after the close of the war for such extensions, and granting them sixteen sections of land to the mile if so extended, but declaring:

"The president and directors of the Houston & Texas Central Railroad Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original bona fide stockholders of said company—those who have paid for stock—to all the rights, privileges and immunities to which they were entitled previous to, and of which they were divested by, the sale of said road to W. J. Hutchins and others; and shall forward to the Governor of the state a copy of said resolution, signed by the president and countersigned by the secretary or treasurer, under the seal of said company; and said company shall not have the power to repeal said resolution so as to defeat the object of this act; provided, that if the said original bona fide stockholders should fail to pay into the treasury of said company ten per cent upon their said stock, on or before the expiration of the extension of time provided in this act for railroad companies to fulfil their charter obligations to the state, then and in that

case said stockholders shall forfeit all their rights, privileges and property interests as stockholders in said road."

"An act for the relief of companies incorporated for purpose of internal improvement, by allowing them further time for performance, on account of the pending war," passed February 13, 1862, providing that the time of the continuance of the war should not be computed against any internal improvement company in reckoning the period allowed them in their charters by any law, general or special, for the completion of any work contracted by them to do.

Ch. 2. Re-enacts same requirement as in the preceding act, precisely, with respect to the Houston & Texas Central Railroad Company.

Ch. 3. The president and directors of any railroad in this state shall not have the power to sell out stockholders in said company by virtue of any law now in force until the expiration of the time of extension provided in this act for the fulfillment of its charter of obligations to the state. 225-7, Civil Code, arts. 4965-7.

These acts were accepted by the president and directors of the H. & T. C. R. Co., called meeting, November 25, 1862.

It will be observed that these legislative acts do not authorize additional shares of stock to be issued for the ten per cent on the old stock required thereby to be paid in.

There was testimony tending to show that by the subsequent understanding and acts of the stockholders, the proposition to issue certificates of stock for the ten per cent to be paid in was abandoned, whether by virtue of the legislative acts or not is not expressly stated.

The number of shares of old stock owned by Van Alstyne is alleged in the petition to have been seven hundred of \$100 each, though the testimony does not show that he owned so many.

It is further alleged that on May 1, 1866, he paid into the company \$3500, and on May 1, 1867, he paid an additional \$3500, aggregating \$7000, as his ten per centum on his stock. The entries on the books of the company show such payments by him, in mortgage debts transferred to the company, on May 31, 1866 and 1867, respectively.

The stock owned by Van Alstyne was represented and voted, through proxy, by plaintiff below, Mrs. Van Alstyne, as executrix of her deceased husband, W. A. Van Alstyne, at several of the stockholders' meetings, as shown by the record.

The original certificates of stock were, by resolution of the company, substituted by new or watered certificates of stock, as they were called, of \$100 each, on the basis of eight new certificates of stock for one of old, and the new stock thus received by Mrs. Van Alstyne was represented and voted by her through proxy, until she finally disposed of it in 1877 to Charles Morgan—a contract

having been made for the purchase by him of a majority or controlling interest in the whole stock of the company. At the time of this sale the secretary made out, under the direction of the company, a list of the shares and owners thereof of the full and entire stock of the company, whether issued in the form of increased stock, or as outstanding on old certificates, amounting to seventy-seven thousand two hundred and thirteen shares. He also reported seventy to ninety shares of old stock, the ownership of which was in dispute, eleven of which were claimed by Mrs. Van Alstyne. This list seems to have included all the stock issued to or claimed by her at that time. The testimony of E. W. Cave shows that Mrs. Van Alstyne admitted to him that she had transferred all her interest in the stock to Morgan; but she denied this.

Mrs. Van Alstyne now claims, and this is the subject matter of this suit, that she is entitled to seventy shares of original stock, by reason of the payment of the \$7000, ten per cent on old stock, or five hundred and sixty shares of new stock at eight for one, and prays judgment for the same or in the alternative for the value thereof, alleged to be the sum of \$56,000.

The defendant, amongst other things, pleaded general denial. 3. That the stock sued for had been disowned and denied all recognition and right whatever in said company throughout its entire existence, and other and different stock throughout the entire existence of the company has been admitted to, and has possessed and exercised the entire and exclusive rights, powers, and privileges of all the stock in this company, in every form of right, duty, possession, power and management of which corporate stock is susceptible, wholly adverse to the existence of and to all rights by or under the preferred stock sued for; and that plaintiff's cause of action accrued more than two years before institution of suit, and is barred by limitation.

4. Same facts and limitation of four years.

5. Facts stated as to ownership and exercise of rights in other stock of the company by plaintiff and her testator, showing complete non-claim and laches as to the stock sued for, for a period of thirteen years.

8. That the increase of eight for one was exclusive of the stock claimed and sued for, and intended and accepted by the stockholders as in full of all rights of stock in the company, and was in excess of all rights to stock to which the stockholders could be lawfully or equitably entitled, on account of the value of the property represented by the stock, the value of such increased stock not at that time, nor at any time until subsequent effects of sale to Morgan, being twenty-five cents on the dollar; wherefore plaintiff could not sue for additional stock in said company.

On the trial below, under the charge of the court, the jury returned a verdict for the defendant upon a special finding as follows:

"We, the jury, find for the defendant on the ground of plaintiff having received satisfaction in the issue of stock, called mutual stock, eight for one." Upon the judgment rendered on this verdict this appeal is taken.

E. P. Turner, for appellant.

I. The court erred in not construing in his charge the resolutions of July 6, 1874, and May 3, 1875, in relation to the action of defendant company in authorizing an increase and exchange of its certificates of stock. This was documentary evidence, and its legal effect should not have been left to the jury to construe. The resolutions should have been construed by the court.

II. There was no proof of exchange of plaintiff's stock, or that she ever availed herself of the resolutions of the company, and hence the portion of the charge excepted to was not applicable to the facts as the same appear of record.

III. There is no evidence of any intention on part of appellant and defendant that by the passage of such resolutions, and exchanging certificates on basis of eight for one, the claim of appellant for the ten per cent stock sued for herein should be discharged and satisfied.

Baker & Botts, Waul & Walker, and Ballinger & Mott, for appellee.

BONNER, ASSOCIATE JUSTICE.—The verdict of the jury in this case, having been based upon a special finding, dispenses with the consideration of several points raised in the voluminous record.

Assigned errors numbers 1, 2, 3, 4 and 12 are pretermitted in the brief of appellant. Numbers 7, 8, 9, 10 and 11 may be appropriately grouped with number 5, as the determination of the latter will decide the others. We therefore find it necessary to consider only numbers 5 and 6.

Following the order in appellant's brief we will first dispose of number 6, which is, that "The court erred in not construing in his charge the resolutions of July 6, 1874, and May 3, 1875, in relation to the action of the defendant company in authorizing an increase and exchange of its certificates of stock. This was documentary evidence, and its legal effect should not have been left to the determination of the jury. They should have been construed by the court."

It is a sufficient answer to this to say that, under the repeated decisions of this court, a judgment in a civil case will not, as a general rule, be reversed for a mere failure on the part of the court below to cover in the charge every phase of the case, when attention is not called to the omission by charges asked or otherwise. No charge was asked in this case.

The fifth assigned error is that: "The court erred in the following portion of its charge, viz.: Unless under the proof and the law

given you in charge you find that plaintiff, as such executrix, has secured payment and satisfaction for the ten per cent paid in by taking and receiving as payment and satisfaction stock called 'watered stock'—i.e., eight shares of new for one share of old, authorized under resolution of the stockholders' meetings of defendant company; but the proof on this subject must satisfy you that the ten per cent stock was intended by plaintiff and defendant company to be included in the issuance of said (eight) for one (watered stock); if such was the intention of those entitled thereto and the defendant company, then you should so find, and in that case find for defendant, and state that you so find by your verdict."

The preceding part of that paragraph of the charge, of which the above is the conclusion, instructs the jury in effect that if the deceased, W. A. Van Alstyne, paid in the ten per cent on his original amount of stock, as contemplated by the circular letter of Hutchins & Paige, and if such payment was accepted by the new company in compliance with its resolutions on the subject, that this entitled him to stock at par for the amount of this ten per cent (being the amount of stock claimed in this suit); and that if the company refused upon demand to issue the same, it was liable in damages for the value thereof with interest, unless, etc., as set out in the above assignment.

The verdict of the jury was based upon this part of the charge, they having found for the defendant on the ground that plaintiff had received satisfaction in the issue of stock called watered stock eight for one.

The objections to the charge are that "The law as given was not applicable to the facts of the case. There was no proof of any exchange of the plaintiff's stock."

The material question in the case then is, was there evidence to support the finding of the jury? If so, then on the facts and under the charge the verdict should be affirmed.

At a stockholders' meeting, May 30, 1871, the following resolution was passed:

Resolved, That the capital stock of the company is hereby declared to be the only such as has heretofore been subscribed for on the books of the old company and paid for, and on which the additional installment of ten per cent has been paid on the books of this company, and the stock subscribed for and issued to Wm. E. Dodge; and that such only is entitled to be registered on the books of the company, and new certificates therefor to be issued to such persons as have become owners thereof.

By unanimous resolutions of stockholders' meeting passed July 6, 1874, and which were substituted by unanimous resolutions passed May 19, 1875, it was ordered that the capital stock of the company be increased to \$10,000,000, and the executive officers were authorized and directed to "issue and deliver to the stockhold-

ers, or their assigns, certificates for eight shares of the capital stock of the company for, in lieu and instead of every one share by them respectively held prior to the adoption of the aforesaid proceedings of July 6, 1874," etc.

Previously thereto the Van Alstyne stock had been represented and voted in the meeting of the stockholders by shares varying in number, but which seem not to have exceeded six hundred and ninety-eight at any one time.

On May 6, 1872, in pursuance of a previous resolution of the company, the secretary in his report of a correct list of the stockholders gave total number of shares at six thousand one hundred and forty-two and that of Van Alstyne at four hundred and ninety-six.

Subsequently, July 13, 1872, at a stockholders' meeting it was resolved that the secretary should spread on the minutes two classifications of the stock of the company.

1. All stock issued prior to April 2, 1861, and all since on subscription of present holder, or upon transfer accompanied by surrender of the original certificate, or affidavit of its loss.

2. To embrace all other issues of stock.

July 31, 1872, stockholders' meeting. Present in person or by proxy. W. A. Van Alstyne, four hundred and ninety-six shares.

Secretary reported classification of stock, seven thousand one hundred and thirteen shares, Van Alstyne, W. A., four hundred and seventeen and one-half first class, two hundred and forty-five and one-half second class; six hundred and sixty-five shares.

There was testimony that some of the stock claimed by the estate of Van Alstyne was in dispute.

At a stockholders' meeting held May 3, 1876, after the resolution of May 19, 1875, to increase the stock eight for one, the estate of Van Alstyne represented four thousand nine hundred and forty-four shares of stock, showing that new stock had under this resolution been received by the estate.

It appears from the record that no stockholder has ever received any of this new stock for the amount of the ten per cent paid in on the old stock, and Mrs. Van Alstyne does not appear to have claimed it at the time she received her new stock on the above basis.

A. S. Richardson, who had been secretary of the company since 1867, and who was the keeper of its stock-books, records and papers, testified that he knew of no claim ever made for this so-called ten per cent stock until application for this in the present suit. No ten per cent stock is shown on the books in any manner, shape or form. It has never been on the books of the company. From the time he became connected with the company the stock that was recognized by the company as controlling and operating the road during all the time of his connection with it was the stock described in the resolution of May, 1871, and upon which the ten

per cent was paid, together with such subsequent stock as was sold to Wm. E. Dodge. In all the proceedings read from the minutes and records this ten per cent stock is never referred to in any manner or form.

There is also testimony tending to prove that Mrs. Van Alstyne stated that she had transferred all her interest in the company to Charles Morgan.

Under the charge of the court to the jury, that the testimony must satisfy them that the ten per cent stock was intended by plaintiff and defendant company to be included in the issuance of said eight for one watered stock, and that if such was the intention, then they should find for the defendant and so state in their verdict, we are of opinion that the testimony was sufficient to sustain the verdict that the plaintiff had "received satisfaction in the issue of stock called watered stock eight for one."

To our minds, the verdict and judgment for the defendant could have been satisfactorily, if not conclusively, based upon the acts of the legislature, which did not authorize the issuance of stock for the ten per cent paid in, as well as upon the issue found by the jury, as it does not appear that Van Alstyne paid in his ten per cent until long after the passage of the acts, and not until after the time had expired to pay it in under the circular letters of Hutchins & Paige.

There being no apparent error in the judgment below, and as it seems from the record that the defendant would have been fully entitled to the judgment upon another issue, the same is affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,

v.

THE BROOKLYN, FLATBUSH AND CONEY ISLAND RY. Co., Respondent.

(89 *New York Reports*, 75.)

The provisions of the Railroad Acts (§ 1, chap. 282, Laws of 1854; § 1, chap. 469, Laws of 1873; § 1, chap. 710, Laws of 1873) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad corporation to organize a new corporation for the purposes of the transfer, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case where there is no such existing corporation.

It is not essential for the purchasing company to file a map of the line thus acquired where it is already constructed.

The provision of the State Constitution (Art. 8, § 18) prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws.

Accordingly, *held*, that said provision did not affect the provision of the Railroad Act of 1839 (§ 1, chap. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations "for the use of their respective roads; and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision.

The provisions of the Railroad Act of 1850 (Chap. 140, Laws of 1850) were not rendered inoperative as to railroads running "over, under, through or across streets, by the Rapid Transit Act, so called (Chap. 606, Laws of 1875), as by the latter act it is declared that it "shall not be construed to repeal or in any manner to affect" the former.

By defendant's charter, its terminus in Brooklyn was "at or near Atlantic avenue," its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. It acquired the right to run its cars upon the tracks of L. I. Co., whose road was constructed along the center of the avenue, and tracks were constructed by the L. I. Co. connecting those of the two roads; similar curved tracks had long been used by the L. I. Co. to reach its depot south of the avenue and for other purposes. The L. I. Co. by its charter had the right to build such appendages as it deemed necessary, and branches when land was offered without expense. *Held*, that by defendant's charter its terminus was not necessarily south of the avenue, and there was nothing therein to prevent it from making such terminus in the center thereof where it could connect with the other road; that the connecting tracks were authorized by the charters of the two companies, and the provision of the act of 1850 (§ 28, subd. 6), authorizing railroad companies to connect their roads, and in no respect could they be considered as a separate and independent line, and so requiring all the steps necessary to a newly-organized street railway.

The map required to be filed by a railroad company is sufficient if it shows the alignment and profile; it is not essential that it should show all the connections, turnouts and switches.

At the time of the passage of the act of 1859 (Chap. 484, Laws of 1859), providing, among other things, for the relinquishment by the L. I. Co. of the right to use steam power within the city of Brooklyn. It was rightfully running its trains by steam through Atlantic avenue. In pursuance of that act it relinquished such right in consideration of a payment made to it, which was assessed upon property benefited, and the road was thereafter operated by horse power until 1876, when the common council of said city passed a resolution, authorizing the use of steam in drawing cars on said avenue, and the legislature passed an act (Chap. 187, Laws of 1876) authorizing such use by the L. I. Co., and immediately thereafter the use of steam power was resumed. In 1879 defendant under its contract ran its cars on the avenue in the same way. *Held*, that the act of 1876 removed the restriction, leaving the original charter power of the L. I. Co. in full force; that it had the right to determine what motive power should be used, both as to its own cars, and as to others which it could lawfully permit to come upon its road; and as, by its lease to defendant, the latter was authorized to use steam power, it could lawfully use it to run its cars on the avenue.

Also *held*, that said act of 1876 was not violative of the provision of the State Constitution (Art. 8, § 18) which prohibits the passage of any private

or local bill granting "any exclusive privilege, immunity or franchise whatever."

Also *held*, that the question, whether said act was violative of the constitutional prohibition against legislation impairing the obligation of contracts, could not be presented in actions brought by the State against defendants to which the assessed land-owners, who alone had such contract rights, if any existed, were not parties.

It is the duty of this court to determine a constitutional question only when it is directly and necessarily involved in the issue to be determined.

It seems that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained.

The Attorney-General, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights.

(Argued April 10, 1882; decided May 2, 1882.)

• APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon an order dismissing the complaint on trial.

The nature of the action and the material facts are stated in the opinion.

W. C. Trull, for appellant. The only franchise acquired by the Coney Island and East River Company was the franchise to construct and operate a road between Atlantic avenue and Coney Island upon the line designated upon its map of location. It could not lawfully abandon any portion of its line or route. (*People v. Vt. R. R. Co.*, 24 N. Y. 267; *People v. Tubbs*, 49 id. 356; *Webb v. Forty-second Street, M. & S. R. R. Co.*, N. Y. Daily Register, February 12, 1881.) The agreement of consolidation being void, the defendant has never been incorporated and has never acquired the franchise, or right to construct or operate a railroad on Atlantic avenue, or elsewhere. (*Matter of B. W. & N. R. W. Co.*, 72 N. Y. 245.) Defendant's chartered rights were limited to the construction and operation of a railroad between the southerly line of Atlantic avenue and Coney Island. As soon as it crossed the line of Atlantic avenue, it overstepped the bounds and limits of its franchise. (*People v. Vt. R. R. Co.*, 24 N. Y. 267; *Thomas v. W. J. R. R. Co.*, U. S. Sup. Ct., 21 Alb. L. J. 409; *Presd't U. B. Co. v. T. & L. R. R. Co.*, 7 Lans. 246.) The act of the defendant in constructing the steam railway in Atlantic avenue was unauthorized, in that it was done without obtaining the consent of the common council of the city of Brooklyn. (Laws of 1850, chap. 140, § 28, subd. 5; Laws of 1864, chap. 582, § 1; Laws of 1854, chap. 140, §§ 1, 2; Laws of 1871, chap. 560, § 1; Laws of 1873, chap. 863, p. 1377, § 23.) The fact that the defendant has never obtained the consent required by the Constitution is conclusive against its right

to construct or operate a railroad on Atlantic avenue. (Const., art. 3, § 18; Laws of 1854, chap. 141, § 1; Laws of 1860, chap. 10, § 1; Laws of 1873, chap. 863, p. 1377, § 23; Laws of 1839, chap. 218, § 1; In the Matter of Oliver Lee & Co. Bank, 21 N. Y. 12; People ex rel. v. Trustees of Fort Edward, 70 id. 28; Falconer v. B. & J. R. R. Co., 69 id. 491; Laws of 1875, chap. 606, § 4.) It is not competent for a railroad corporation to lease its road to an individual. (Woodruff v. Erie R. R. Co., 13 N. Y. Weekly Dig., No. 7, Nov., 1881, p. 162; Abbott v. Johnstown, G. & K. R. R. Co., 9 N. Y. Weekly Dig. 545; 80 N. Y. 27.) The sole right acquired by Mr. Richardson as purchaser of the franchises and privileges of the Brooklyn and Jamaica R. R. Co. was to associate with himself, as such purchaser, other persons, and to acknowledge and file articles of association as prescribed by statute. (Laws of 1854, chap. 282, § 1; Laws of 1873, chap. 469, § 1; chap. 710, § 1; Laws of 1874, chap. 430; Laws of 1876, chap. 440; Laws of 1869, chap. 917, § 9; Laws of 1875, chap. 108.) The lease from the Atlantic Avenue R. R. Co., to the Long Island R. R. Co. is void upon its face as being against public policy. (1 Redfield on Railways [5th ed.], 617; T. & R. R. R. Co. v. Kerr, 17 Barb. 601; Copeland v. Citizens' Gas Co., 61 id. 60; Wood v. Truckee Co., 24 Cal. 274; Thomas v. W. J. R. R. Co., 11 Otto, 71; Abbott v. J. G. & K. R. R. Co., 9 N. Y. Weekly Dig. 545; 80 N. Y. 27; Laws of 1839, chap. 218, § 1.) The act of 1876, which grants the right to use steam power upon Atlantic avenue, is unconstitutional. (Const., art. 3, § 18; Laws of 1876, chap. 177, p. 166; Matter of Gilbert El. Ry. Co., 70 N. Y. 370.) The act of 1876 is also invalid, in that it impairs the obligation of the contract by which the Brooklyn and Jamaica and Long Island companies agreed not to use or permit the use of steam upon Atlantic avenue. (U. S. Const., art. 1, § 10; Laws of 1859, chap. 444, § 6; Laws of 1859, chap. 484, § 9; Laws of 1860, chap. 92, § 7; chap. 100, § 2; chap. 460, § 4; Laws of 1873, chap. 432, § 2.) The grant of the right to use steam upon Atlantic avenue, as contained in the act of 1876, even if it be a valid law, is by the express terms of the grant limited to the corporations therein named, and is not assignable. (Blackwell v. Wiswell, 14 How. Pr. 257; Harding v. The St'mb't Munich, 5 Law Rep. 106; Mendenshall v. Klinch, 51 N. Y. 246.) If, for any of the reasons heretofore advanced on the part of the plaintiff, the act of the defendant in constructing and operating a steam railway upon Atlantic avenue be unlawful, then those acts constitute a nuisance, and should be enjoined by this court. (Davis v. The Mayor, 14 N. Y. 514, 525; People v. Kerr, 27 id. 193; Fowler v. Saunders, Cro. Jones, 446; King v. Russell, 6 East, 427; Rex v. Carlisle, 6 C. & P. 636; Rex v. Cross, 3 Camp. 226; Rex v. Jones, id. 230; Rex v. Moore, 3 B. & A. 184; Comm. v. Passmore, 1 S. & R. 219; Rex v. Ward, 4 Ad. & El. 334; People v. Cunningham, 1 Denio,

524; *Hart v. The Mayor*, 9 Wend. 571; 2 Story's Eq., §§ 921, 922; *Atty.-Gen. v. Cohoes Co.*, 6 Paige, 143; *Raines v. Baker*, Amb. 158; *Samson v. Smith*, 8 Sim. 272; *Spencer v. L. & B. R. R. Co.*, id. 193; *Atty.-Gen. v. Richards*, 2 *Anst.* 603; *Corning v. Lowerre*, 6 *Johns.*, Ch. 439.) The commissioners were not officers or agents of the State, but were officers of the court by whom they were appointed, and were not acting solely in the interest of the State, but in the interest of the property-owners upon whose application they were appointed. (Laws of 1859, chap. 481, § 1; *Beard v. City of Brooklyn*, 31 *Barb.* 149; *McCullough v. Mayor*, 23 *Wend.* 459; *Lake v. Trustees of Williamsburgh*, 4 *Denio*, 523; *Trustees of Dartmouth College v. Woodward*, 4 *Wheat*, 518; *University v. People*, 99 *U. S.* 309; *State Bk. of Ohio v. Knoop*, 16 *How.* 369; *New Jersey v. Wilson*, 7 *Cranch*, 164.) There cannot be an extra allowance where the subject-matter is a mere right, not involving any claim of property, e.g., a suit for an injunction. (*People v. N. Y. & S. I. F. Co.*, 68 *N. Y.* 71; *Atlantic Dock Co. v. Libbey*, 45 *id.* 499; *Grissler v. Stuyvesant*, 67 *Barb.* 81.) Even if it be conceded that the State was a party to the contract, it by no means follows that it could abrogate it. (*Hall v. Wisconsin*, 103 *U. S.* 5, 11; *Walker v. Whitehead*, 16 *Wall.* 314, 317.) The position taken that it is beyond the scope and power of the legislature to abridge its legislative powers by contract is untenable. (*Keith v. Clark*, 97 *U. S.* 474; *Murray v. Charleston*, 95 *id.* 444; *New Jersey v. Yard*, *id.* 104; *Harrington v. Tennessee*, *id.* 679; *Humphrey v. Pegues*, 16 *Wall.* 244; *Wilmington R. R. Co. v. Reid*, 13 *id.* 264; *Home of the Friendless v. Rouse*, 8 *id.* 430; *McGee v. Mathias*, 4 *id.* 143; *Jefferson B'k v. Skelby*, 1 *Black*, 436; *Dodge v. Woolsey*, 18 *How.* [U. S.] 331; *Gordon v. Appeal Tax Court* [3 *How.*], 15 *Curtis*, 338.) The provision of the contract prohibiting the use of steam was authorized by the act of 1860, which preceded it, and also validated by the subsequent legislation, which confirmed the contract and recognized it as in force. (Laws of 1873, chap. 432, § 2; *Brown v. Mayor*, 63 *N. Y.* 239.) There is no force in the contention that treating the contract in question as a simple relinquishment of the right to use steam on the avenue, the companies were at liberty to resume the use of steam at pleasure, if the legislature so authorized. (*Fletcher v. Peck* [6 *Cranch*], 2 *Curtis*, 337.) The provision of the act of 1860 (Chap. 460), making the contract binding upon any corporation using the road, and the act of 1859 (Chap. 484, § 6), prohibiting the use of steam and repealing all laws authorizing its use by either of the companies, amount to a covenant upon the part of the State that it would not thereafter restore the right to use steam. (*Binghamton Bridge*, 3 *Wall.* 51, 81; *Bridge Proprietors v. Hoboken Co.*, 1 *id.* 116.) The constitutional provision prohibiting a State from passing a law impairing the obligations of

contracts equally prohibits a State from enforcing, as a law, an enactment of that character, from whatever source originating. (*Williams v. Bluffy*, 96 U. S. 184; *Farrington v. Tennessee*, 95 id. 682.) The burden of proof is on the defendant to show its right to maintain and operate a railroad upon Atlantic avenue, and to use steam power thereon. (*People v. Utica Ins. Co.*, 15 Johns. 387; *Angell and Ames on Corporations*, § 756; *High on Ex. Rem.*, § 652; *People v. Thatcher*, 55 N. Y. 528.)

E. B. Hinsdale and William C. De Witt for respondent.

The defendant's incorporation and the consolidation of the two former corporations leading thereto were, in all respects, valid. (*Laws of 1869*, chap. 917; *Hentz v. L. I. R. R. Co.*, 3 Barb. 646; *People v. N. Y. C. & H. R. R. R. Co.*, 74 N. Y. 302; *Pierce on Railroads*, 254. The defendant had a lawful right to cross the southerly sidewalk and half of Atlantic avenue, to the old railroad bed of the Long Island Railroad Company, in the centre of that avenue. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Walton v. Lift*, 14 Barb. 216.) Aside from constitutional questions, the use of defendant's cars upon Atlantic avenue, under the contract with the Long Island Railroad Company, was authorized by law. (*Fisher v. N. Y. C. & H. R. R. R. Co.*, 46 N. Y. 644; *Bloessburgh & C. R. R. Co., v. Tioga R. R. Co.*, 1 Abb. Ct. of App. Dec. 149; *Parker v. R. & S. R. R. Co.*, 16 Barb. 315.) The act of 1876 restoring the use of steam power upon the old railroad bed of Atlantic avenue by the corporation in possession thereof, or its lessees, was constitutional and valid. (*Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; *Matter of Binghamton Bridge Co.*, 3 Wall. 51; reversing 27 N. Y. 87; *B. & L. R. R. v. S. & L. R. R.*, 2 Gray, 1; *Mohawk Bridge Co. v. Utica R. R.*, 6 Paige, 554; *C. R. Bridge Co. v. Warren Bridge Co.*, 11 Peters, 420; *Richmond R. R. Co. v. L. R. R. Co.*, 13 How. [U. S.] 71; *People v. Bowen*, 30 Barb. 27; *B. & N. Y. R. R. v. Dudley*, 14 N. Y. 366; *Saratoga P. R. Co. v. Thatcher*, 11 id. 102; *Matter of N. Y. El. R. R.* 70, id. 327; *Rogers v. Bradshaw*, 20 Johns. 735; *Jerome v. Ross*, 7 Johns. Ch. 315-342; *Newton v. Comm'r's of Mahoning*, 100 U. S. 548; *People v. L. I. R. R. Co.*, 9 Abb. N. C. 181.) The contract made with the commissioners under the act of 1859 did not operate to prohibit the future use of steam power at any time thereafter when the legislature should see fit to grant the right. *Newton v. Comm'r's of Mahoning*, 100 U. S. 548; *Presbyterian Church v. New York*, 5 Cow. 538; *Britton v. The Mayor*, 21 How. Pr. 251; *Matter of Oliver Lee*, 21 N. Y. 9; *Cooley on Const. Lim.*, § 340, etc.) A railroad lawfully in a public street is not a nuisance. (*Kellinger v. Forty-second Street R. R. Co.*, 50 N. Y. 206; *People v. Kerr*, 27 id. 188; *Wager v. T. U. R. R. Co.*, 25 id. 526; *In re. Prospect Park & C. I. R. R. Co.*, 8 Hun, 30.)

FINCH, J.—The questions argued in this case are numerous and important, but are not all within a just construction of the issue raised by the pleading. The action was brought by the State, through its attorney-general, against the defendant corporation, to restrain it from running its cars and locomotives along and upon Atlantic avenue, in the city of Brooklyn. The defendant is sued by its corporate name; it is sought to be enjoined as a corporation; and its existence as such is nowhere in the complaint denied. Its right to run its cars from Atlantic avenue to Brighton Beach is not questioned or challenged; and while its origin, as the product of a consolidation, is stated, and the lines of the two absorbed companies, as laid down on their respective maps, are alleged to have been parallel and competitive, yet the corporate existence of the defendant is assumed, and the fair scope and purpose of the action is not to assail its existence and adjudge its usurpation of corporate rights, but to keep it within its chartered limits and the boundaries of its franchise. If there are defects in its organization, it will be time enough to consider them when the rights which it exercises are in some form directly menaced. The investigation, therefore, will be narrowed to two questions, viz.: Whether the defendant has the right to run its trains on Atlantic avenue at all; and, if it has, whether it is at liberty to operate them by steam.

What was known as the Brooklyn and Jamaica Railroad Company was organized in 1832 (Chap. 256), and was authorized to construct and maintain a railroad with a single or double track, "and with such appendages as may be deemed necessary for the convenient use of the same," from any eligible point in the village of Brooklyn to any point within the village of Jamaica, and also of constructing and using a single or double lateral railroad, southward to the then village of Flatbush, and northward to Flushing. It was further provided that it should make use of no street or lane, nor run with steam power within the village limits without the permission of the corporate authorities of Brooklyn first had and obtained. The company constructed its road, and began its operation in 1835. It obtained by purchase or condemnation a right of way, eighty feet wide, upon and along what has since become a part of Atlantic avenue, in the city of Brooklyn, and operated its road with steam, presumably with the consent of the village authorities.

In 1834 the Long Island R. R. Co. was chartered (Chap. 178) and authorized to build a single or double track, with such appendages as it deemed necessary, from a point in or near Greenport through the middle of Long Island to the water's edge in the village of Brooklyn, at a point to be designated by its trustees, and to prescribe "by what force the carriages to be used thereon may be propelled," but was put under a condition, as in the case of the prior company, not to use any street or lane, or run with steam

power in Brooklyn without the previous permission of its trustees. This road obtained the permission and was operated by steam. In 1836 (Chap. 94) the Brooklyn and Jamaica Company was authorized to lease or sell its road to the Long Island Company, and appears to have made such lease at about that date, which was surrendered in 1860 and renewed at some time in 1867. The Long Island Company was further authorized in 1839 (Chap. 277), to build any branch railroads, "in any part of Long Island," as it should deem expedient and necessary, in cases where the landholders offered the land required free of expense.

In 1853 (Chap. 220) an act of the legislature provided that every railroad company on Long Island, whose road had been constructed and was in use, should have the right to propel its cars with "the like motive power" as that then employed, upon condition that the strip of land on the south side of Atlantic avenue, between Gowanus lane and Classon avenue, should be ceded to the city of Brooklyn for a public street, by the Brooklyn and Jamaica Company, which owned the same, and both parties were authorized to contract accordingly. In 1855 that agreement was made, both companies joining in it, and the city, in exchange for the land received by it, giving to the railroads a right of way thirty feet wide through the center of Atlantic avenue, and the full right and authority to operate their roads by steam.

It is entirely clear, therefore, that at the date of this contract, each of the two companies by force of their charters, by the assent of the village and the city of Brooklyn, and by the contract with the latter made under legislative sanction, had acquired and possessed the right to operate their roads with steam power upon and along Atlantic avenue in Brooklyn. It remains to see how the defendant became a sharer in that right.

In 1855 the Brooklyn and Jamaica Company mortgaged its property and franchises in the usual form. That mortgage was foreclosed, and, upon the sale ordered by the court, all the property and franchises mortgaged were purchased by William Richardson, who thereafter, and in 1874, conveyed all his rights to the Atlantic Avenue R. R. Co. This corporation was already in existence, having filed its articles of association under the General Railroad Act on the 1st day of May, 1872, and its route including Atlantic avenue and other streets of the city. It is claimed that this conveyance was inoperative on the ground that under the statute the purchaser could only associate with himself other persons and so form a new corporation to which the property and franchises could be transferred. That is a plain misconception of the act. (Laws of 1854, chap. 282, § 1; Laws of 1873, chap. 469, § 1, and chap. 710, § 1.) Before these acts were passed, such a railroad mortgage, while it certainly covered the special and peculiar franchises of the company, could with difficulty be construed to cover its corporate life,

or right to be a corporation, and the subject created doubt. That right, it was argued, could scarcely be said to pass to a purchaser by virtue of his purchase, and could only be given by the authority of the State. Unless, therefore, the purchaser could find some corporate body in existence, capable of holding and exercising the franchises purchased, he stood in the awkward predicament of owning a property which it was not certain he could either use or sell. It was to cure this difficulty that the act of 1854 and its subsequent amendments were designed. In the absence of an existing corporation, capable of taking and exercising the franchises sold, the purchaser was authorized to create a new corporation for the purposes of the transfer, but whose corporate life came from the grant and authority of the State. It is quite evident that this authority was intended only to meet a possible emergency, and not at all to prevent a sale or transfer to a corporation already existing, and capable under the law of its creation of holding the property and exercising the franchises which passed to the purchaser by the mortgage sale. We think, therefore, that the deed of Richardson was operative to corner to the Atlantic Avenue Company all the property and rights of the mortgagor except barely the corporate life of the latter; and that the omission of the purchasing company to file a map of its line thus acquired was of no consequence, since it bought a road already constructed and in existence.

In 1877 the Atlantic Avenue Company leased all that portion of its road from near Flatbus havenue to the city line to the Long Island Company, and in 1879 both companies joined in a contract with the defendant by which the latter was authorized to operate its trains over the road of the former on Atlantic avenue. The right of the defendant, as derived from such two companies, to run its cars over Atlantic avenue, is entirely plain, if its contract was valid, and if it had or acquired the right to make the necessary connection by crossing the south line of the avenue. Both of these propositions are here in dispute.

The invalidity of the contract is put mainly upon two grounds, each of which aims to modify if not repeal the provisions of the act of 1839 (Chap. 218, § 1) by the authority of which the contract was made. That act made it lawful for any railroad corporation to contract with any other railroad corporation "for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed by said contract." It is argued that the constitutional provision of 1875 (Art. 3, § 18) is a restriction upon legislative power, and applies to the act of 1839, and forbids a contract under it for running through the streets of a city without first obtaining the prescribed consents. But the prohibition invoked is one against future legislation, and has no reference to previously existing laws. It commands the legislature not to "pass" a private or local bill, for certain specified purposes, and ordains that those

purposes shall be accomplished through the aid of general laws, and then restrains their range by a further condition, that even by a general law the legislature shall not authorize "the construction or operation of a street railroad" except in certain cases. The whole scope of the section is to dictate to the law-making power what it may or may not do thereafter, what bills it may pass and what it shall not, and not at all to affect or act upon the past legislation which at the time was entirely lawful. We have heretofore declared this doctrine so plainly as to make unnecessary a more detailed discussion. In the matter of the Gilbert Elevated Ry. Co., 70 N. Y. 361. But it is further claimed that under the act of 1875, known as the Rapid Transit Act, the defendant could not acquire the right by contract or otherwise to operate a railroad along or upon the city streets and avenues, except in accordance with the terms and conditions of that act, and that the latter is so repugnant to and inconsistent with the provisions of the general act of 1850, as to make it plain that the latter is no longer in force as to railroads running "over, under, through or across" streets, avenues and places. But the Rapid Transit Act expressly provides that it "shall not be construed to repeal or in any manner affect chapter 140 of the Laws of 1850," etc. It is our duty to obey the mandate and not undertake to construe the act in a manner which the legislature has forbidden. We entertain no doubt, therefore, that the contract of the defendant with the two companies occupying Atlantic avenue was valid, and gave it the right to run its cars upon that avenue.

But the question now comes whether it could get there, and whether its connection with the other roads was lawful? Its main line approached the avenue nearly at right angles. By its charter its terminus in Brooklyn was "at or near Atlantic avenue." Its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. To reach the tracks in that highway and connect with it, what is called in railroad parlance a "Y" was built. A double track curving to the westward was laid across the south line of the avenue and joined to the tracks in its center, and a similar curve at the east united with the avenue rails in that direction. These connecting tracks were built by the Long Island Company, but paid for by the defendant, and were laid in pursuance of the contract between the two companies, and for the purpose of making their arrangement effectual. Similar tracks had long existed before, though not in the same precise place, which had been used by Long Island Company as a means of reaching its depot south of the avenue, and for purposes of handling freight. On this state of facts it is insisted on behalf of the appellant that these connecting curves constitute a new, separate and independent railroad, which could not be laid across or upon the avenue without

all the steps and conditions applicable to a newly organized street railway.

Our first inquiry then is, whether these connecting curves are a separate and independent line, or a part of the authorized and chartered line of the defendant on the one hand, or the Long Island road on the other? Under its charter, the northern terminus of the defendant's line was "at or near Atlantic avenue," and the question raised is, whether by force of that phraseology its terminus was necessarily south of the avenue, or might be adopted at any point within it? In the case of *The Farmers' Turnpike Co. v. Coventry* (10 Johns. 389), the words "to the city of Hudson" were held not to terminate the road at the bounds of the city, but carried it within the city limits, and that such words must have a reasonable interpretation. In the *Mohawk Bridge v. The Utica & Schenectady Railroad Co.* (6 Paige, 554), the words "at or near" the city of Schenectady were held to give the right to enter the city limits. The chancellor said that the word "at," when it precedes the name of a place and denotes situation, frequently means the same as in or within. And in *Mason v. Brooklyn City & Newtown R. R. Co.* (35 Barb. 377), the words "to terminate at Newtown" were held not to stop the road at its boundary, but to permit it to pass within. Of course the circumstances of a particular case must affect the construction, but we see nothing in the facts before us to indicate that the charter was intended to prevent the company from crossing the south line of the street, and making its terminus in the center, where it could connect with another line. The fact that its line as mapped stopped short of that point is not conclusive. The same fact existed in the case last above cited, and the court held that, while the map was decisive on a question of route, it could not work a change of the termini, or an abandonment of a portion of the authorized road. In the present case even the appellant would be obliged to concede that notwithstanding the map filed the defendant could build the omitted twelve feet. If it could do that it could go to the center of the avenue if the language of the charter permitted. The map required to be filed is intended mainly for the purpose of acquiring property necessary to be taken, and is sufficient if it shows the alignment and profile without showing all the connections, turnouts and switches. But the Long Island road had a right to cross the south line of the avenue. It had done so for years. By its charter it had the right to build such appendages as it deemed necessary, and even branches where the land was offered without expense. Its built these curves for a purpose consistent with its business and because deemed necessary to its successful conduct, and with the consent of adjoining landholders. These facts, taken in connection with the provisions of the act of 1850, which give the right to any company "to intersect, join and unite its railroad with any other railroad before constructed,

at any point upon its route, and upon the grounds of such other company, with the necessary turn-outs, sidings, and switches and other conveniences in furtherance of the objects of its connection?" (Laws of 1850, chap. 140, § 28, sub-div. 6), seem to us to make it our duty to hold that these curves were authorized by the charters of the companies, and were in no just sense or respect a separate and independent road. As a consequence the objections founded upon that idea, that the curves were in excess of defendant's charter, that the common council did not consent, that a map of the curves was not filed, that their construction was prohibited by the charter of 1873, and that the constitutional consents were not given, seem to us without force and inapplicable to the real situation. In reaching this conclusion we have not overlooked what are claimed to be the alleged admissions in the answer. It would be an unreasonable and too rigid construction to hold that they related to the terminus of the line instead of to its general route.

The question which remains is the most important of all. It is, whether the defendant is entitled to run its trains on Atlantic avenue by steam-power? Whether that question is fairly in the case has occasioned us not a little of doubt and hesitation. It would not be an unreasonable construction of the complaint that it challenged only the defendant's right to run on Atlantic avenue; but as another construction is possible, and the question of motive power has been very fully and ably argued on both sides, we have thought it best to meet it.

In 1859 the Brooklyn and Jamaica Company and the Long Island Company were running their trains up and along Atlantic avenue rightfully, and with the full authority and consent of the State and the city. In that year the legislature passed an act (Laws of 1859, chap. 484) to provide for the closing of the tunnel of the Long Island Railroad Company, in Atlantic street, and for the relinquishment by said company of its right and to use steam power within the city of Brooklyn. The act authorized the common council, upon the petition of a majority of land owners within the district of proposed assessment, to apply to the Supreme Court for the appoint of three commissioners, who should be empowered to contract with the Long Island Company and the Brooklyn and Jamaica Railroad Company, to relinquish the use of steam within the city limits, in consideration of a payment not exceeding \$125,000, which sum was to be raised by assessment upon property benefited, within a certain specified area. The act provided that upon the confirmation of the report of the commissioners the right of the two companies to use steam power within the city limits should end, and repealed, as of that date, all laws conferring such right. The contract was made accordingly, the assessment levied and the money collected and paid, and the right to use steam surrendered. The road was thereafter operated by horse power until

1876, a period of about sixteen years. In that year came a change of purpose. The common council of Brooklyn, on the 13th of March, passed a resolution permitting and authorizing the use and operation of steam, and steam locomotives and cars on Atlantic avenue, between Flatbush avenue and the city line, by the Atlantic Avenue Railroad Company, or any railroad company acquiring, by lease or otherwise, the right so to use and operate the railroad on such avenue. In the succeeding month the legislature enacted that it should be lawful for the Atlantic Avenue Company, and the Long Island Company as its lessee, to run cars over the road on the avenue, from the city line to Flatbush avenue by steam power, subject to such rules and regulations as the city of Brooklyn might prescribe. Immediately after the passage of this act the Atlantic Avenue road resumed the use of steam power, and in 1877 the Long Island Company re-laid the track with heavier rail and better suited for the use of locomotives, and thereafter moved its trains by steam. In 1879 the defendant, under its contract with the two companies, ran over their road in the same way.

It is observable that the right of the two companies, the Long Island and the Atlantic Avenue, to use steam power under the consent of the city and the authority of the State is not assailed. They are not made parties defendant, their right is in no respect challenged; and it would, perhaps, be just to assume it as conceded for the purposes of the present action, and so limit the scope of the inquiry to the question whether the right regained by them could be by them shared with or transferred to the defendant corporation. That, at all events, is the preliminary inquiry. The Long Island Company had, by its charter, the express right to prescribe by what motive power its road should be operated. It could select and use any appliance it pleased. By the contract of 1860 it submitted to a restriction upon that power which excluded steam. But the general power remained. The whole range of choice and invention, outside of the one excluded motor, was left. The act of 1876 removed that restriction, and removing it, left the original charter power in full force and without exception. Thereafter it could lawfully choose freely and unquestioned what motive power should be used upon its road. And this it could do do, not only as its own cars, but as to any others which it could lawfully permit to come upon its road. By the act of 1839 it was empowered to contract with any other railroad company; not a company operated by this or that specific motive power, but operated by any, without regard to its special character; and the latter could use the road leased for such use in such manner as "may be prescribed by said contract." By its charter and by the act of 1839 the Long Island Company could dictate to the defendant the use of horses or permit it to use steam. It did the latter, and lawfully conferred the authority. It should be remembered that the use of steam was

never by contract or statute forbidden to the defendant. On the contrary, it was organized as a steam railroad. Wherever it could lawfully go, it could go with its own authorized motive power, until it reached a locality where steam was forbidden. It went lawfully upon Atlantic avenue, and steam was not there and then forbidden. On the contrary, it was expressly authorized.

The question, therefore, comes down finally to the validity of the legislative authority which restored the use of steam upon the avenue. And here the absence of the two companies most deeply interested in that question makes itself very strongly felt. It raises an inference that such issue was not intended to be presented for our determination, but in the view we take of the case it seems to us best to waive the difficulty and determine the question as between the present parties and those only.

It is the State which sues. No private citizen is seeking to vindicate his individual rights. That would present a very different case from the one before us. It is the State, representing the whole people, which seeks to restrain the defendant from exercising a right which the State, representing the whole people, expressly conferred. That is the decisive answer except as to the constitutionality of the act conferring the authority. The State sues to abate a public nuisance, to stop an unlawful act, to restrain an usurped authority. But that is not a public nuisance which the State has expressly authorized; that is not an unlawful act which the statute has permitted; that is not an usurped authority which is legitimate and granted by law. The State, therefore, must fail, unless—and that is the final inquiry—the act of 1876 restoring the authority is unconstitutional and void.

That act is claimed to violate the provision of the Constitution which prohibits the passage of any private or local bill granting "any exclusive privilege, immunity or franchise whatever." (Art. 3, § 18.) No "exclusive" privilege was given. The restoration of the right to use steam power was neither exclusive nor a monopoly. The monopoly lay, if anywhere, in the original grant of the right to build the road along its chosen line. The machinery it should use, the power it should adopt, were but incidents of the right. One of these was taken away and then restored. This was not a grant of a new franchise, but a restoration of suspended charter powers, or rather the removal of a restriction from their full and complete exercise. The *Elevated R. R. Cases* (70 N. Y. 361, 327) have substantially decided the question in favor of the constitutionality of such an act.

But it is said this act impaired the obligation of a contract, and the reasoning upon which this objection rests is founded upon a theory that the assessed land-owners were in some way parties to the contract, and had vested rights under it. But they are not here. Their contract rights, if they have any, are not before the

court and we are not called upon to determine them. It is our duty to decide a constitutional question only when it is directly and necessarily involved in the issue to be determined. That is not the case here. If there was any contract, to which the assessed land-holders were parties, it was either between them and the State, or between them and the two railroad companies. If it was between the land-owners and the State, and amounted to a covenant by the latter not to restore steam on Atlantic avenue, as is contended, it is enough to say that the validity or invalidity of that contract is not here involved. That is a question to be settled between the parties to such contract. A statute is assumed to be valid until some one complains whose rights it invades. (Cooley on Const. Lin., 163.) The land-owners are not here complaining. We do not know that they ever will. They have the power to waive a constitutional provision made for their benefit. (Embury v. Conner, 3 N. Y. 511.) Possibly they have already done so, or may in the future. We cannot know, and until they come present their contract and invoke the constitutional protection, no tribunal is called upon to grant it. The State and the land-holders must be left to settle their own controversies. This one is between the State and the railroad companies. It is only when some person attempts to resist the operation of the act, "and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained." (Wellington, Petitioner, 16 Pick. 96.) A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. (Cooley, supra, 180.) So that we are to leave the land-owners to vindicate their contract with the State, if they have one, when they please and in their own way. But if, to avoid this answer, the ground is shifted to the theory that the State, represented by its commissioners, was the agent of the land-owners, in making the contract with the railroad companies, and in some manner represents the rights of such land-owners in this action and prosecutes in their behalf, the difficulty is that the necessary facts are wanting. It is still true that the attorney-general, in an action brought by him, represents the whole people and a public interest, and not mere individuals and private rights. (People v. Booth, 32 N. Y. 397; Davis v. The Mayor, etc., 14 id. 528.) The question which he can raise is over a public wrong and not over a contract between individuals. The rights of the land-owners are personal to each, and not common to the whole people. If the former have a contract with the railroad companies which they have violated, the courts are opened to the injured parties, and all their remedies are intact. If in such an action the act of 1876 should be relied upon as a defence, and it became necessary to attack it as unconstitutional because impairing the obligation of a contract, the question would be fairly presented and might have

to be met. But it is not before us in this action. The sole question here is, whether the public have been wronged, whether a public nuisance exists, whether a franchise has been usurped or the limits of a charter exceeded. We decline, therefore, to consider the question in this action whether the contracts of individuals not parties before us have been improperly invaded, and must assume as against such objection the constitutionality of the act of 1876. We must hold, therefore, that it gave a valid authority, as against the State, to use steam power upon Atlantic avenue, and that the action was correctly determined in favor of the defendant and the complaint properly dismissed.

The judgment should be affirmed with costs.

All concur, except Danforth, J., not voting, and Tracy, J., taking no part.

Judgment affirmed.

INDIANAPOLIS AND ST. LOUIS R. R. Co.

v.

DANIEL MORGANSTERN.

(108 *Illinois Reports* 149. *June Term*, 1882.)

Where an appeal bond purporting to have been executed in the name of a railroad company by its general attorney, has the seal of the corporation attached, the presumption will arise that the person using the seal had authority to do so.*

APPEAL from the Appellate Court for the Third District.

This is an appeal by the railroad company, the appeal bond being signed, "Indianapolis and St. Louis Railroad Company, by John

* Where it is recited in the body of an appeal bond given on appeal by a private corporation, that the company by its corporate name had entered into the obligation, and the bond is signed by the president and secretary of the company, and sealed with its corporate seal, that will be a sufficient execution of the bond in the name of the corporation. *Bills et al. v. Stanton*, 69 Ill. 51.

An appeal bond copied into the record, purported to have been executed by the Illinois Central Railroad Company, by an attorney in fact, with a scrawl attached,—it was held, on a motion to dismiss for want of the corporate seal, that the court did not know, judicially, that the company had a seal other than the scrawl such as appeared in the record. *Illinois Central Railroad Co. v. Johnson*, 40 Ill. 85.

In copying into the transcript of a record an appeal bond purporting to have been executed by a corporation, the corporate seal, if attached thereto, may be represented by a scrawl; a fac-simile of the seal or device can not be made in the copy. *Ibid*.

Where an appeal bond, purporting to have been executed by an attorney in

T. Dye, General Attorney," with the seal of the corporation attached.

Messrs. CRAIG & CRAIG, for the appellee, now move the court to dismiss the appeal on the ground the appellant corporation does not appear to have had its corporate name attached to the appeal bond by any person having authority to sign the same.

SCHOLFIELD, J.: The bond appears to have been executed under the seal of the corporation. This raises the presumption that the person using the seal had authority to do so. There is no attempt to impeach the authority, nor is it claimed the seal of the corporation has been improperly used.

Motion denied.

RAE

v.

GRAND TRUNK RAILWAY CO.

(*Advances case, Michigan, November, 1882.*)

It is no longer necessary to take advantage of the want of the requisite citizenship by plea in abatement. If this or any other defect of jurisdiction appears upon the trial, it is the duty of the court upon its own motion to stop the proceedings and dismiss the suit.

An amendment to the declaration, designed to raise a question "under the constitution and laws of the United States," and thereby to create a case cognizable by the circuit court, irrespective of the citizenship of the parties, will not be permitted unless it appears that it will be likely to avail the plaintiff.

A state statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times and for a reasonable compensation, to be agreed upon by the parties or fixed by the railroad commissioner, does not conflict with the constitutional provision that Congress shall have power to regulate commerce between the states.

On motion to dismiss.

This action was brought by a car-coupler in the employ of defendant to recover for personal injuries sustained by him in coup-

fact, was approved by the court from which the appeal was taken, it will be presumed there was before that court sufficient evidence of the authority of the attorney to execute the bond in behalf of his principal. Ibid.

In *Cromwell v. March, Breese*, (Beecher's ed.) 326, a supersedeas bond was executed by "Murray McConnel, attorney for the plaintiff." The supersedeas was quashed for the reason it did not appear that McConnel was authorized to sign the bond as attorney. But it was held in *Campbell v. The State Bank*, 1 Scam. 423, where a supersedeas bond purported to have been executed by a person as attorney in fact, in the name of his principal, and the authority of the attorney did not appear, this court would presume that the attorney had authority to execute the bond unless his authority was questioned by affidavit.

ling two freight cars at the Grand Trunk Junction in this city, one of which belonged to the defendant and the other to some other road, being what is termed a "foreign car." This foreign car differed in construction from those used by the defendant, in having what is known as a "platform dead-wood," and, it was claimed, was not only much more dangerous in its original construction, but was out of repair, and that defendant's inspectors were guilty of negligence in permitting it to pass over the road. The declaration described the plaintiff as a resident and a citizen of the eastern district of Michigan, and the defendant an alien. Upon the trial, however, it appeared that the plaintiff himself was also an alien, and the defendant immediately moved that the action be dismissed for want of jurisdiction.

D. E. Prescott and John D. Conely, for plaintiff.

H. H. Swan and Henry Russell, for defendant.

BROWN, D. J.—That this court has no jurisdiction of controversies between aliens, either under the judiciary act of 1789 or the act of 1875, is admitted. Prior to act of 1875, however, advantage could be taken of the want of requisite citizenship only by plea in abatement; if the defendant pleaded to the merits the jurisdiction was admitted. *Smith v. Kernochan*, 7 How. 198; *Sheppard v. Graves*, 14 How. 505; *De Sobry v. Nicholson*, 3 Wall. 420. While the jurisdiction of the circuit courts is considerably enlarged by the the first section of the act of 1875, and apparently extended to the utmost constitutional limit, section 5 vests these courts with a summary power to stop proceedings and dismiss a suit, whenever it shall appear that it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable by such court. The salutary nature of this provision is not open to question. It is notorious that claims have been enlarged or collusively assigned to non-resident plaintiffs and fictitious domiciles established, for the express purpose of clothing the Circuit Court with jurisdiction of cases which had no proper place upon its dockets. Frequently this fraud upon the court passed undiscovered until the trial had been begun, and it was too late to take advantage of it. This section was admirably designed to strike at the root of these covert attempts to confer jurisdiction. While it has been the practice in this district, even since the act of 1875, to plead the want of proper citizenship in abatement, it is clear, from the opinion of the Supreme Court in *Williams v. Notatawa*, 104 U. S. 209, that this is no longer necessary, and that it is the duty of the court, of its own motion, to dismiss the suit the moment the want of jurisdiction is made evident. Thus, if it should appear that the plaintiff and defendant were both aliens, or citi-

zens of the same state, or that the plaintiff at the time suit was commenced, must have known that the amount of his recovery would be less than \$500, I apprehend it is the duty of the court to dismiss; although if he had sued in good faith to recover more than \$500, the fact that the verdict for a less sum was obtained, would not deprive the court of jurisdiction, and would only affect his right to costs. As it is not disputed in this case that both parties are aliens, the suit must be dismissed.

(Plaintiff thereupon moved for leave to amend his declaration by averring in substance that the defective car belonged to a foreign corporation; that such car was loaded outside of the state, and was in course of transmission through the state to its place of destination. He further averred that there was a state statute in force at the time of the accident which provided that every corporation owning a road in use was at reasonable times, and for a reasonable compensation, to be fixed by the parties or the Railroad Commissioner, compelled to draw the merchandise of another corporation; that since the passing of such statute two decisions have been rendered by the Supreme Court of the state, which held that by reason of said statute the duty of the company in the reception of such car was only to furnish competent inspectors. He further averred that said statute, as construed by said Supreme Court, is in conflict with the provision of the constitution of the United States that Congress shall have power to regulate commerce with foreign nations and among the several states.)

The object of this amendment is evidently an endeavor to raise a question under the constitution and laws of the United States, and thus create a case cognizable by this Court under the first section of the act of 1875. It seems to me that there can be no question that it was the intention of Congress in enacting this section to permit the plaintiff to resort to the Federal courts in every case involving over \$500 in amount, and arising under the Constitution or laws of the United States, notwithstanding the defendant may be a citizen of the same state, and thereby to obviate the necessity which had previously existed of suing in the state court, and finally raising the Federal question upon a writ of error from the Supreme Court of the United States to the Supreme Court of the State. *Sawyer v. Concordia*, 12 Fed. Rep. 754.

Whether, if this amendment had been originally incorporated into the declaration, it would have raised the Federal question, it is unnecessary to decide, for I am clearly of the opinion that where the discretion of the court is invoked to permit such an amendment, we are at liberty to examine and determine the point whether it be likely to avail the plaintiff. The proposed amendment contains in substance an averment that the Supreme Court of this state has construed a state statute, requiring railroad corporations of this state to draw cars of other corporations, as re-

lieving such roads from any further obligation with respect to the running condition of such cars, than to provide competent inspectors to see that they are in order, and that such statute, as so construed, is in conflict with the constitutional provision that Congress shall have the power to regulate commerce with foreign nations and among the several states. But clearly these rulings of the Supreme Court are not constructions of the statute, and hence are not binding upon this court. They are mere definitions of the duties of a railroad corporation receiving cars which they are compelled to transport under the statute. This is a ruling upon a general question of law, and not obligatory upon this Court. To construe a statute or other writing is to determine the meaning of the words used. It is obvious that the Supreme Court was not called upon to do this in the cases referred to.

And, again, it is equally clear that the statute in question does not conflict with the constitutional provision, since nothing is better settled than that the state legislatures may lawfully regulate commerce passing through their territory, when such regulations do not conflict with any Congressional enactment. Thus, in the *Railroad Co. v. Fuller*, 17 Wall. 560, it was held that a state statute requiring railroads to fix their rates for transportation of passengers and freight, and to cause a printed copy of such rates to be posted up at all their stations along the line, was a mere police regulation, and did not conflict with an act of Congress authorizing railroads to receive compensation for the transportation of passengers and merchandise over their lines. It was stated by Mr. Justice Swayne to be such an act as forms "a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves." See, also, *C., B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Munn v. Illinois*, 94 U. S. 113; *Sherlock v. Alling*, 93 U. S. 99-104.

In all such cases respecting commerce between different states the state legislatures may act, and their statutes are valid so long as Congress does not see fit to legislate upon the subject, and supersede the statutes of the state by enactment of its own.

The motion for leave to amend must be denied, and the case dismissed, with costs.

THE CAPE MAY AND SCHELLENGER'S LANDING R. R. Co.

v.

THE CITY OF CAPE MAY.

(35 *New Jersey Eq. Reports*, 419.)

There can ordinarily be no judicial restraint or interference with municipal corporations in the bona fide exercise of powers, legislative or discretionary in their nature, provided private rights are not violated.

But when the corporation has fulfilled its legislative functions, and exercised its legislative discretion, and is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene.

The repeal of an ordinance will not operate to disturb private rights vested under it.

On application for injunction, heard on bill, answer and order to show cause.

Mr. S. H. Grey, for complainants.

Mr. Peter L. Voorhees, for defendants.

VAN FLEET, V. C.—This is an injunction bill. The complainants seek to have the common council of the city of Cape May prohibited from passing a certain ordinance. On the 21st day of May, 1881, an ordinance was regularly passed and approved, authorizing the complainants to construct a horse railroad, with the necessary turnouts, through certain streets of Cape May. The complainants, under the authority thus given, proceeded to construct their road. When the road was nearly completed, an ordinance was introduced repealing portions of the prior ordinance, and revoking the authority given to the complainants to use certain streets, in the construction of their road. This ordinance has been read a second time, and is about to be put on its third reading and submitted to a final vote. The complainants ask that the common council be enjoined from passing it. It is not averred, or shown, that the city authorities intend, in the event that the repealing ordinance is passed and takes effect, to order the track of the complainants removed, or to tear it up. The bill simply alleges that unless the common council are restrained, they will pass the ordinance. Under the provisions of the charter of Cape May, before an ordinance can take effect as a law, it must be passed by the common council, be approved by the mayor, and then be published for two weeks in the newspapers of the city.

Whatever doubts may have before existed, respecting the power of the courts to control the acts of municipal corporations, they seem now to be at rest, and the line defining in what cases they

may intervene, and in what they should not, seems to be marked distinctly and with precision. The rule upon this subject is stated with perspicuity by Judge Dillon, as follows:

"There can, ordinarily, be no judicial restraint or interference with the bona fide exercise of powers, legislative or discretionary in their nature, and which do not violate private rights." 2 Dillon on Mun. Corp. (3d ed.) § 908.

Chancellor Zabriskie, in speaking upon the same topic, says: "All legislative acts, or exercise of discretionary powers, within their authority, are beyond the control of the courts, however unwise, or impolitic, or even when done from corrupt motives, or for unworthy purposes. Their legislative powers are, when exercised within their authority, supreme. But when the corporation have fulfilled their legislative functions, and have exercised their legislative discretion,"—and are about carrying their legislation into execution, then, if the effect of their act is to violate vested rights or inflict irreparable wrong, the courts may properly intervene. *Bond v. City of Newark*, 4 C. E. Gr. 376, 384. Vice-Chancellor Dodd gave expression to similar views in *Schumm v. Seymour*, 9 C. E. Gr. 143, 147.

There is no difficulty whatever in applying this rule to the case in hand. It falls, indeed, directly within it. The court cannot grant the complainants' application, unless it is willing to attempt to control the defendants in the exercise of their legislative authority. It may be that the act the defendants propose to do will be without legal force. That, unquestionably, will be its condition if its effect is to take away any rights previously granted. The repeal of an ordinance will not operate to disturb private rights vested under it. 1 Dillon on Mun. Corp. (3d ed.) § 314. But on this application, the court has nothing to do with the effect of the proposed ordinance. The question to be answered now is, can the court interdict its passage? Both principle and authority oppose the exercise of such power by the court.

Had the defendants in this case admitted, as did the defendants in *Patterson and Passaic H. R. Co. v. City of Paterson*, 9 C. E. Gr. 158, that their purpose in introducing the repealing ordinance was to pass it, in order that they might, under its authority, tear up the complainants' track, then inasmuch as it would have clearly appeared, by the confession of the defendants, that they had, in advance of the passage of the ordinance, determined to do the complainants an irreparable wrong, and simply used the ordinance as a means to an unlawful end, I should not hesitate to advise that the course adopted in that case should be taken in this. The defendants in that case openly avowed that they intended to pass the ordinance for the purpose of depriving the complainants of their vested rights. No such purpose is averred or shown in this case. On the contrary, I think the court is bound to believe, upon the

facts before it, that the defendants are acting in good faith, and with an honest purpose to put the question in dispute between themselves and complainants in such form that it may be judicially decided. Unless the defendants are allowed to pass the repealing ordinance, the question whether it is valid or not can never be raised. That is a question belonging exclusively to another tribunal, and consequently it seems very clear to my mind that this court should do nothing which shall prevent either party from presenting that question to the appropriate tribunal for determination.

The injunction will be refused, and the complainants' bill dismissed, with costs.

THE CAPE MAY AND SCHELLINGER'S LANDING R. R. Co.

v.

ELDRIDGE JOHNSON et al.

(85 *New Jersey Eq. Reports*, 422.)

A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain.

It is an established rule of the court of chancery that it is not open to any party to question the orders of the court, or any process issued under its authority, by disobedience; and even where the order is improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority.

An attempt to justify such disobedience by showing that the act was committed after consultation with counsel, and upon his advice to disregard the notice, will afford the defendants neither justification nor palliation.

On application for an order adjudging the defendants guilty of contempt, etc.

Mr. S. H. Grey, for complainants.

Mr. Peter V. Voorhees and Mr. Peter L. Voorhees, for defendants.

VAN FLEET, V. C.—The defendants are before the court on a charge of contempt. On the 20th day of June, 1881, an order was made directing the city council of the city of Cape May to desist and refrain from passing a certain ordinance, and also to show cause, at a subsequent day, why an injunction should not issue restraining the same act. The order was granted at Newark about midday on the day of its date. The council, it was understood, were to meet on the evening of the same day for the purpose of

doing the act which the order was intended to restrain. The distance between the point where the order was made and the point where the defendants were to meet, rendered an actual service of the order impossible before the next day. Notice of the fact that an order had been made prohibiting the passage of the ordinance was sent to the president of the council by telegraph, which he received before the council convened on the evening of the 20th, and afterwards read to the council in open meeting. A special messenger, sent by the complainants, gave the council the same notice while they were in session on the evening of the 20th. The council the next day (June 21st) passed the ordinance.

The facts just stated are undisputed. They show that the defendants are guilty. The regularity, validity or correctness of the order contemned cannot be examined on this proceeding. While an order of a court remains in force it must be obeyed. Even if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. The rule upon this subject has been laid down with great clearness and force by Lord Truro. He says: "It is an established rule of this court that it is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act which this court may do which may not be questioned in a proper form and on a proper application; but I am of opinion that it is not competent for any one . . . to disobey an injunction, or any other order of the court, on the ground that such orders were made improvidently. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained." *Russell v. East Anglican Ry. Co.*, 3 Macn. and G. 104, 117. The same doctrine, in a less amplified form, was expressed by Chancellor Vroom in *Richards v. West*, 2 Gr. Ch. 456.

The notice that the defendants had of the order, at the time they violated the command, was, according to the authorities, entirely sufficient. Where the charge is that the defendant has willfully contemned the authority of the court, all that need be shown is that he knew of the existence of the order at the time he violated it. *Haring v. Kauffman*, 2 Beas. 397. Lord Eldon held that if a defendant is in court when an injunction is granted, he has sufficient notice of it to make it his duty to respect it. He also held that if the defendant is not in court when an order for an injunction is made, but is informed that such an order has been made,

NOTE.—In two recent English cases, notice of the granting of an injunction, given by telegraph, was held sufficient, *Ex parte Langley*, L. R. (13 Ch. Div.) 110; *Tonkinson v. Cartledge*, 22 Alb. L. J. 128.—REF.

by a person who was in court when the order was made, he has sufficient notice of the injunction to render him liable to punishment for its breach. *Vansandau v. Rose*, 2 Jac. and Walk. 264. The rule as thus stated by Lord Eldon was enforced in *Hull v. Thomas*, 3 Edw. Ch. 236; and *Hull v. Thomas* is cited, with approbation, by Chancellor Williamson in *Endicott v. Mathis*, 1 Stock. 110, 114.

Notice given by telegraph has recently been adjudged in England to be sufficient. The solicitor of the party obtaining the injunction, immediately after it was granted, notified the defendant, by telegram, that an injunction had been granted. The defendant disregarded the notice, and proceeded to do what the notice informed him he had been commanded not to do. The defendant was brought before the court on a charge of contempt, and Bacon, V. C., held that the telegram constituted sufficient notice, and adjudged the defendant guilty of contempt. In *re Bryant*, L. R. (4 Ch. Div.) 98.

Notice, to be sufficient, need possess but two requisites—first, it must proceed from a source entitled to credit; and second, it must inform the defendant clearly and plainly from what act he must abstain. The notice in the case under consideration possessed both requisites. It was sent by the counsel who obtained the order, and it not only informed the defendants what act the order prohibited, but warned them, if they disregarded the order, their disobedience would be a contempt of the authority of the court. There is nothing in the conduct of the defendants indicating that they had the least doubt concerning the authenticity of the notice or the truth of its contents. They made no inquiry respecting its authenticity or its truth, but say that they consulted counsel whether or not they could safely disregard it, and were advised that they could. This advice, to say the least of it, was both injudicious and dangerous. It affords the defendants neither justification nor palliation. They must be adjudged guilty of contempt.

The complainants, since the proceeding for contempt was instituted, have voluntarily brought the order to show cause why an injunction should not issue to hearing, and it has been decided against them. While the fact that the order contemned was improvidently or erroneously made, neither justifies nor excuses the defendants; it is a matter which it is proper the court should consider in awarding punishment. *Sullivan v. Judah*, 4 Paige 444; *Partington v. Booth*, 3 Mer. 148.

Each of the six defendants must pay to the clerk, for the use of the state, a fine of \$10, and they must also jointly pay the taxed costs of this proceeding.

THE LEHIGH COAL AND NAVIGATION CO.

v.

THE CENTRAL R. R. CO. OF NEW JERSEY.

(85 *New Jersey Eq. Reports*, 426.)

1. The receiver of a railroad corporation has no power, without the authority of the chancellor, to make a contract which will bind the trust.

2. All contracts made by the receiver of a railroad corporation are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best.

On petition by Edward W. Vanderbilt and Edward W. Hopkins, and answer by Henry S. Little, receiver of the Central R. R. Co. of New Jersey, and depositions taken in open court.

Mr. Holmes, of New York City, and Mr. A. Q. Keasbey, for petitioners.

Mr. Benjamin Williamson, for receiver.

VAN FLEET, V. C.—The petitioners, Edward W. Vanderbilt and Edward W. Hopkins, are dealers in railroad supplies. They formed a copartnership to engage in that business in March, 1881. Between the formation of their copartnership and the death of the first receiver of the Central R. R. Co. of New Jersey, which occurred on the 3d day of March, 1882, they show that orders were issued to them by the purchasing agent of the receiver, for cross-ties and lumber, to an amount exceeding \$535,000. Of the amount so ordered, over \$200,000 has been delivered and paid for; an additional part has been offered to the present receiver and he has refused to receive it. Of the whole quantity ordered, over \$300,000 remains to be delivered. The following statement will show the character and value of that yet to be delivered, sufficiently for present purposes:

Georgia pine lumber.....	\$8,895 70
North Carolina plank and sawed timber.....	19,221 80
Cross-ties.....	185,941 87
White oak timber.....	89,221 95
White oak switch timber.....	46,186 80
White ash timber.....	2,027 87
	<hr/>
	\$300,926 99

The orders for the ties were all drawn on the same date, January 17th, 1882, and involve an outlay, as above shown, of nearly \$136,000. The present receiver having refused to accept certain of the material offered, and also notified the petitioners that he

would not receive that yet to be delivered, the petitioners now apply to the court, praying that the receiver be directed to accept and pay for the material which has already been offered, and which he has refused to receive, and also that he be directed to receive that which shall hereafter be delivered under the orders, or that such other direction be given to him as shall be equitable and just, under the circumstances of the case.

Assuming that the orders issued to the petitioners are entitled to be treated as contracts, the important question is, do they bind the trust? The principle which must govern the court in deciding this question seems to me, from the very nature of the case, to be quite obvious and simple, and it is this: when a railroad corporation passes into the custody of the law, for the purpose of having its road operated and its property administered by the chancellor, for the benefit of the public and for the protection of its creditors and stockholders, neither its franchises nor its property can be legally charged with any burden or obligation without the order of the chancellor. The chancellor is in possession of this railroad. The receiver is the chancellor's officer; he acts simply in a fiduciary capacity, and is at all times subject to the orders of the chancellor. The statute regulating the operation of railroads while in the custody of the law, declares that the receiver shall operate the road for the use of the public, subject at all times to the orders of the chancellor. Rev. p. 196 § 106. The chancellor may, at any time, for whatever may seem to him sufficient cause, remove the receiver, and not a dollar expended in operating the road can be allowed to the receiver, in his accounting with the trust, except by the order of the chancellor. All outlays made in behalf of the trust must either be authorized in advance, or subsequently ratified by the chancellor. Whatever is not so authorized or ratified, cannot be charged against the trust. This presents the whole argument in a single sentence. It is thus demonstrated, as it seems to me, that nothing the receiver can possibly do, by contract or expenditure, can be made effectual against the trust without the sanction of the chancellor.

The rule as to what expenditure the receiver of a railroad corporation may make, without first obtaining the approval of the chancellor, with certainty that allowance will be made therefor, is stated as follows by Mr. Justice Bradley of the Supreme Court of the United States, sitting as circuit judge:

"It may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different

from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. . . . In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed." *Cowdrey v. Railroad Company*, 1 Woods 336. This rule, it will be observed, simply prescribes what expenditures, out of the funds in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands belonging to the trusts, to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them, or disregard them entirely.

This, in my judgment, is the only safe rule that can be adopted. The chancellor is unquestionably charged with the responsible and delicate duty of finally passing upon all outlays, and deciding whether they were necessary, proper or judicious, and should be allowed or not. It is a duty from which he cannot escape, and which he is bound to perform, as he is bound to perform all his other judicial duties, fearlessly, impartially and justly. There can be no doubt that the chancellor may annul or disregard any action of the receiver which seems to him to be improvident, or likely to obstruct or prevent a wise and just administration of the trust. Now, if receivers of this class are allowed to enter into engagements, independently of the chancellor, which shall bind the trust, it is easy to see that such receivers will be forced into a position, where their bias will always be very strongly in favor of the fairness, wisdom and expediency of their action, and in such a condition of affairs, it requires no prophet to foresee that many contracts will be made, which will have the appearance, under an arranged or fabricated state of circumstances, of being nec-

essary or judicious, but which in fact, will be grossly otherwise, but which from the difficulties and obstructions with which the court is environed, it will be impossible, except in cases distinguished by great fraud or gross extravagance, to see in their true light, and to deal with as truth and justice demand. But this, in my judgment, is not a matter of policy, but a question of power. And, in my opinion, a receiver of a railroad corporation has no authority, without the sanction of the chancellor, to make a contract which will bind the trust.

The petitioners, in accepting these orders, acted with their eyes wide open. They knew what they were doing. They were dealing with an officer possessing very limited powers, and who was constantly subject to the orders of the power which created him. They knew that the chancellor, in obedience to the law, had taken possession of this corporation for the purpose of giving due protection to its creditors and stockholders, and that he was bound to guard their rights and interests with the most sedulous care, and to prevent everything like extravagance and waste. They must also be assumed to have known that the receiver could make no contract effectual against the trust, which was not first authorized or subsequently ratified by the chancellor. They were at liberty to decline to contract until such authority was obtained, or to require the receiver to bind himself in his individual capacity. If they chose to act without adopting such precautions as were necessary to insure them against loss, they must be understood as having deliberately assumed whatever risk attended their venture, and if it has turned out that the hazards were greater than they estimated, or that the course of events has been less propitious for them than they hoped, their miscalculations or misfortunes are not a grievance, but rather the result of their own rashness. They stand in this matter as mere volunteers, and this court should not, therefore, extend help to them, even if their conditions is one of great hardship, if it must be given at the expense of those who have higher claims upon its protecting care.

But, simply deciding that these orders do not bind the trust, and that the court is at liberty to ratify them or disregard them, as to it may seem wise and just, does not determine all the questions presented for judgment by this application. If the material covered by these orders is reasonably necessary for the present purposes of the road, and can be obtained of the petitioners at prices as moderate as it can be obtained of other dealers, and at such times and in such quantities as will enable the receiver to make the best use of it, to refuse to receive it merely because no legal obligation exists rendering its acceptance a duty, would be both arbitrary and unjust. But the proof shows that a large part of the material in controversy is not only not now needed, but that a part of it is wholly unfit for railroad purposes, and if accepted, would

never be used. The orders, taken in gross, it will be observed, cover an enormous quantity of material. Those issued for ties, on a single day, require the delivery of four hundred and fifty thousand, a number sufficient to build one hundred and eighty miles of road, counting two thousand five hundred to the mile. The proof shows that the receiver now has on hand sixty thousand more ties than will be used during the current year. Such transactions cannot be accurately and plainly described, except we say they are improvident.

When the orders are viewed in their aggregate, and it is seen that, in a single year, the material ordered of the petitioners amounted to over half a million of dollars, more than one-half of which remains to be delivered; and when it is remembered that, in most instances, the orders neither state a price nor designate a time or place of delivery, and that, so far as appears, the petitioners never, in a single instance, bound themselves to furnish the material ordered, but left themselves free to furnish it or not, as their interest might dictate, it is extremely difficult to believe that the orders were understood by either party to constitute complete binding contracts. The more reasonable theory respecting them, in view of all the facts, is, as it seems to me, that they were simply issued as notifications to the petitioners, of what material would probably be needed by the road in the future, to afford them an opportunity to make such preparation to furnish it, in case it should be required, as they should deem safe and prudent, but they were under no obligation to furnish it in any event, nor the receiver to take it, unless he gave a further special order, designating price and the time when delivery must be made.

There are other facts which need not be mentioned or discussed, entitled to more or less weight, the effect of which is to strengthen and confirm my conclusion. After careful and patient consideration of the whole case, my judgment is that the petition must be dismissed.

I think it is proper to state that I regarded this case as so important and novel, in most of its features, that it should not be decided without conference with the chancellor, and I am much gratified to be able to say, after conference with him, that he concurs in the principles enumerated in the foregoing opinion.

CHAPMAN

v.

THE PITTSBURGH AND STEUBENVILLE RAILROAD COMPANY et al.

(18 *West Virginia Reports*, 184. May 30, 1881.)

The general rule is, that when proceedings are had to sell the fee in land, it is not necessary to make the lessee of the land a party to the suit.

Where it does not appear in the pleadings or otherwise in the case, that a person has an interest in the subject-matter of the suit, he is not a necessary party to the suit.

Where a firm takes a contract from a corporation to construct an improvement, and said firm sub-contracts to another firm, which does a large amount of work, and the first firm fails and cannot pay the sub-contractors, and to induce the sub-contractors to go on with the work the corporation assumes to pay the old debt due the sub-contractors, and releases the contractors from all obligations to pay such old debt, the first contracting firm is not a necessary party.

The general rule is, that when it is necessary to adjudicate the rights of an assignee, the assignor must be made a party to the suit; but to this rule there is the exception, that where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is neither doubted nor denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party.

If a person is not named in the bill, and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process.

Although a person be named in the prayer of the bill and also in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill, to which he could answer, and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest.

The Court will not take judicial notice that a railroad company under its charter condemned or acquired title to any particular land, or strip of land.

Where a strip of land with a railroad track thereon in a proceeding against a foreign corporation and with no charter privilege from this state, in which the road is situated, is attached at the suit of a creditor, and it does not appear in the record that any railroad chartered in this state has any interest therein, the Court will regard the strip of land so attached as ordinary real estate; but no decree with reference thereto or sale of the land thereunder can affect the rights of any railroad chartered in this state or any interest of such railroad in such land, of whatever character that interest may be, such road not being a party to the suit.

Generally exceptions to the reports of master-commissioners partake of the nature of special demurrers; and if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the Court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence on which they are founded.

If a railroad company let a contract to construct a road to a firm, and that firm sub-lets the contract to another firm, which does a large amount of work,

and the first firm fails and does not pay the sub-contractors, and the railroad company to induce the sub-contractors to go on with the work agrees to pay to them the debt of the contractors, such agreement is founded on a valid consideration and is binding.

Where three suits are consolidated, and there are attachments in each, and the defendant, a non-resident corporation, appears in the suits, and a personal decree is rendered against it, but in one of the suits the trustees holding the legal title are not before the Court, and the Court as to that suit declines to make an order of sale as to the attached property but remands it to rules to bring in the trustees holding the legal title, and in this state of the case an appeal is taken from the decree in the consolidated suits, this Court will not consider any alleged errors in such attachment, because its validity had not been passed upon by the circuit court.

Where the bill makes reference to the important exhibits and bases allegations thereon, and the defendant answers and does not deny the existence of the exhibits nor contest their validity, and they are not produced, the defendant can make no objection in the appellate court to their non-production.

Where an attachment is sued out against a non-resident corporation, which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such non-resident corporation, which appears in the cause; but the attached property will not be sold in the absence of trustees, who hold the legal title; they must either be served with process, or, if non-residents, an order of publication must issue against them and be duly published.

Appeal from and supersedeas to a decree of the circuit court of the county of Brooke rendered on the 22d day of February, 1877, in three consolidated causes in said court then pending, in which G. M. Chapman was plaintiff and the Pittsburgh & Steubenville Railroad Company and others were defendants, allowed upon the petition of said company.

Hon. Thayer Melvin, judge of the first judicial circuit, rendered the decree appealed from.

JOHNSON, Judge, furnishes the following statement of the case:

There are three suits consolidated in this record. On the 4th day of January, 1867, the plaintiff filed his affidavit for an attachment in equity, claiming a large amount of indebtedness due him as assignee of J. R. Cook & Co., and J. R. Cook. The same day a summons in chancery issued from the clerk of the circuit court of Brooke county, on which summons an order of attachment was by the clerk endorsed, and on the same day the sheriff of the county endorsed his levy. To this suit, the Pittsburgh and Steubenville Railroad Company, and Thomas Seabrooke, trustee, were made defendants; and an affidavit being filed that said defendants were both non-residents, an order of publication was issued, which was, as the decree shows, executed.

On the 12th day of January, 1867, the said Chapman filed another affidavit claiming a further large indebtedness to him as the assignee of said J. R. Cook & Co. and J. R. Cook; and James Harvey also filed on the same day an affidavit for said Chapman covering the same indebtedness. The affidavit of the plaintiff was made on

the 7th day of January, 1867, in Illinois. On the said 12th day of January, 1867, a summons issued in chancery in this suit No. 2, in Brooke County, and an order of attachment was by the clerk endorsed thereon; and on the same day a levy was by the sheriff made on the same property, as was mentioned in the levy in the first suit, to wit, on all "the legal and equitable interest of the Pittsburgh and Steubenville Railroad Company in the real estate of said company and in the right of Thomas Seabrooke, trustee, in the said county of Brooke, and particularly on a piece of tract of land about one hundred feet wide, extending from or near to the Ohio river, near the mouth of Harmon's creek, along the ravine of said creek, or near the same, to or near the Pennsylvania state line; also upon the railroad track and appurtenances on said land."

In May, 1867, the bill in this case was filed, making the said railroad company, Thomas Seabrooke, trustee, Isaac Jones and Robert Woods, defendants; and an affidavit being filed of the non-residence of said corporation and also of the other defendants, an order of publication issued, which according to the decree was "duly executed."

Suit No. 3 was instituted in Hancock County, and the affidavit for an attachment made by the said plaintiff, claiming as assignee, etc., of the same parties and in his own right and as assignee of James Andrews, a further large indebtedness, was made and filed by said Chapman on the 11th day of June, 1867. A summons in chancery issued on the same day, and on it an order of attachment was by the clerk of the circuit court of Hancock County endorsed, and was levied by the sheriff on the same day "on all the lands, railroad track, railroad bed and premises on said land belonging to the Pittsburgh and Steubenville Railroad Company in the county of Hancock," etc.

The bill in this cause was filed at September rules, 1867, and made defendants thereto the said railroad company, Daniel Tyler and Ambrose W. Thompson, trustee, Isaac Jones, Robert Woods, The Holliday's Cove Railroad Company and Thomas McElrath, trustee; and The Western Transportation Company was also named in the process, but no allegation against it appeared in the bill. Affidavit being filed, that all the above parties except Daniel Tyler and Ambrose W. Thompson, trustees, who were omitted from the affidavit, were non-residents of the state, an order of publication issued, which, the decree recites, was "duly executed." The court refused as to this case to order a sale of the attached property, until the said trustees were before the court by publication or otherwise. The defendant, The Pittsburgh and Steubenville Railroad Company, answered in both the Brooke county cases, but not in the Hancock County case. By consent of plaintiff and The Pittsburgh and Steubenville Railroad Company by counsel on the

8th day of December, 1869, the Hancock County suit was removed to the circuit court of Brooke County. On the 16th day of December, 1869, by consent of the same parties the three suits were consolidated. On the same day on motion of the plaintiff the causes were referred to Commissioner A. J. Clark, "to audit, state and report an account showing indebtedness, if any, upon the part of the defendant, The Pittsburgh and Steubenville Railroad Company, to the complainant by assignment or otherwise upon the claims set up in each and all of the bills in the cases now consolidated or upon any of them, with power to take such additional testimony as either party may produce before him at such time or times as the master may fix upon, etc."

On the 4th of March, 1875, the master filed his report. To this report both the plaintiff and defendant, the Pittsburgh and Steubenville Railroad Company, filed exceptions. As the plaintiff's exceptions do not appear to be insisted upon, I deem it unnecessary to copy them. The railroad company, by counsel, filed the following exceptions in substance to said report:

1. That he does not report, that the claims were due at the date of the attachment.

2. The claim allowed in favor of John S. King & Co. in account with J. R. Cook & Co. is illegal and void, and constitutes no claim upon the defendant, being a sub-contract by J. R. Cook & Co. with J. S. King & Co., who failed to perform their contracts, and had really no assignable interest, if they had made such assignment.

3. To the allowance of claim in exhibit "A" on the ground that said J. R. Cook & Co. never had any contract whatever with the said railroad company for the construction of their work or any part thereof, and the same is unsupported by evidence.

4. To the allowance of account exhibit "C," on the ground that there is no evidence to support the same, and that the same is illegal and void.

5. In the allowance of claim set forth in exhibit "D," on the ground that there is no evidence to show, that the certified estimates therein specified belonged to, or, at the time the suit was brought, were the property of plaintiff.

6. To the whole report, on the ground that commissioner failed to pass upon the competency or admissibility of testimony taken in the cause, as the same was in the opinion of defendant most important to a fair trial. By consent this matter was referred back to the commissioner, and he made the report desired, which he said did not change the state of the account.

7. Because the Commissioner reported that the defendant was, on the 4th day of January, 1867, indebted to complainant, assignee of J. R. Cook & Co., in the sum of \$20,466.12, with interest from September 1, 1857, as specified in exhibit "A," whereas the com-

missioner ought to have reported, that the defendant was not on the said 4th day of January, 1867, or at any time, indebted to the plaintiff, as assignee or otherwise, in said sums with interest, or any part thereof.

8. Because said commissioner reports, that on the 4th day of January, 1867, the defendant was indebted to the plaintiff in the sum of \$77,059.00 with interest from February 1, 1858, as detailed in exhibit "B," when he should have reported, that defendant was not on that day or at any other time indebted to the plaintiff in that sum and interest or any part thereof.

9. Because said commissioner reports, that on said day the defendant was indebted to plaintiff as assignee, etc., in the sum of \$41,550.00, with interest, as shown in detail in exhibit "C;" when he ought to have reported, that defendant did not owe him such sum of money or in any part thereof. *

10. Because said commissioner reports, that at said date the defendant owed plaintiff for the coupons mentioned in said report the sum of \$10,430.00 with interest, which is computed to amount on the 1st day of February, 1875, to \$7,434.00; when he ought to have reported, that defendant did not owe complainant said principal and interest or any part thereof.

11. Because said commissioner has reported, that on the said 4th January, 1867, the defendant was indebted to plaintiff in the sum of \$26,064.95 with interest from March 1, 1859, for the certified estimates mentioned in said report and exhibit "D;" when the commissioner should have reported, that the defendant did not owe said sum of money and interest or any part thereof.

On the 22d day of February, 1877, the court entered the decree appealed from and passed upon the said exceptions. The court sustained the exception to the claim in exhibit "C" "as to seven and a half per cent per annum on the excess over \$500,000.00 for exchange of bonds. It also sustained the exceptions as to all coupons of a less denomination than \$17.50, evidently because no such coupons had described in the bill. It also sustained exception as to the \$26,054.00 for certified estimates. The court overruled all the other exceptions and rendered a formal decree against the defendant. The Pittsburgh and Steubenville Ry. Co., for \$298,081.23 with interest on the principal, \$143,495.12 from the date of the decree, and also for costs, and ascertaining the amount that was a lien on the property attached in Brooke County, as appeared in the two Brooke County suits, ordered the said attached property in Brooke County to be sold to pay the same:

There is a large number of depositions and other evidence in the the cause, making near three hundred and fifty printed pages, which was all considered by the master.

The court did not order the sale of the attached property in the Hancock County case, because the legal title was not before the

court, and remanded that cause to rules, with leave to the plaintiff to make new parties thereto.

From and to the decree rendered in the said consolidated cases, the defendant, The Pittsburgh and Steubenville R. R. Co., obtained an appeal and supersedeas.

Daniel Lamb, for appellant relied on the following authorities: 2 Rob. (old) Pr. 349, 350; 3 Munf. 79; 1 H. & M. 543; 1 Dan. Chy. Pr. (3d ed.) p. 338; Sto. Eq. Pl. § 287; 5 W. Va. 24; 10 W. Va. 135; 3 Metc. (Ky.) 278; Id. 181; 1 Metc. (Ky.) 470; 1 Davis, 184; 65 N. Y. 310; 2 Pat. & H. 47; 3 Leigh, 306; 2 U. S. Dig. 1st Ser. pp. 64-5, ¶¶ 1176, 1181; 2 H. & M., 315; 18 Gratt. 854; Acts 1877 p. 147; Code of Va. (1860) ch. 151, § 11; 1 Black, 518; Sto. Eq. Pl. § 257; 1 Dan. Chy. Pl. (3d ed.) 335; 2 Rob. (old) Pr. 287, 289; 107 Mass. 73; 14 Ohio St. 340; 10 Pet. 209; 7 Wheat. 526; 10 W. Va. 107; 8 W. Va. 274; 9 C. & P. 619; 2 Rob. 258; 1 Dan. Chy. Pr. 192, 195; 18 Gratt. 82; 3 Lead. Cas. in Eq. (3d ed.) 308, 309, 358; Id. (4th ed.) 1562, 1564, 1646; 13 Gratt. 426; 7 W. Va. 47; 15 Gratt. 157; 19 Gratt. 747; 6 Rand. 444; 10 Gratt. 179; 28 Gratt. 822; 3 Munf. 29; 7 W. Va. 187; Id. 458; 10 W. Va. 60; 9 Gratt. 275; 25 Gratt. 375; 6 Gratt. 96; 10 Gratt. 284; 7 Leigh, 313; 9 Leigh, 49; 3 Rand. 158.

James Harvey, for appellee, cited the following authorities; 25 Ind. 453; 83 Mass. 160; 16 Mich. 478; 1 Esp. 121; Bos. & Pull. 158; 1 E. D. Smith, 32, 192; 41 N. H. 388; 33 Vt. 174; 53 N. Y. 114; 55 N. Y. 495; 1 B. & A. 297; 6 Jurist, 125; 3 T. R. 174; 2 H. & M. 603; 5 Wend. 277; 34 Barb. 97; 5 Taunt. 450; 11 Allen, 123; 14 Allen, 407; 9 Gray, 435; 24 N. Y. 57; 7 W. Va. 458; 1 Tuck. Com. Book 2, p. 271; 1 Gratt. 347; 5 Cranch, 162; 5 Rand. 211; 10 Curtis, 164; 16 Pet. 25; 14 Curtis, 174; 16 How. 1; 9 Pet. 275; 15 How. 233; 17 How. 322; 21 Curtis, 1; 1 Wall. 206; 7 Wall. 82; Id. 103; 23 Gratt. 267; Id. 309; 20 Gratt. 377; Id. 398; 11 Gratt. 611; Sto. Eq. (5th ed.), § 284; Id. § 279; 9 Gratt. 131; 43 Conn. 234; 3 Kent. Com. (8th ed.) 47.

John J. Jacob, for appellee, cited the following authorities: 10 Gratt. 284; 11 Gratt. 610; 26 Gratt. 765; 7 W. Va. 380; Id. 454; 3 Leigh, 307; 2 H. & M. 308; 15 Gratt. 54; Drake Attach. §§ 418, 421; 2 Rob. 258; 10 W. Va. 130; 7 W. Va. 704; 10 Gratt. 284; 22 Gratt. 205; 26 Gratt. 765; 3 Gratt. 4; 7 W. Va. 454; 8 W. Va. 29; 1 Dan. Chy. Pr. (3d Am. ed.) 286, 287; Id. 175, 176; Id. 201; Malcolm v. Scott, 3 Hare; 10 Wheat. 152; 2 Paige, 18; Sto. Eq. Pl. §§ 77, 78, 96; § 234; Id. Johns. Chy. 319; 7 Ves. & B. 550; 5 Madd. 289; 2 Atk. 515; 3 Swanst. 142 note; 14 Gratt. 128; 11 Gratt. 636; 2 H. & M. 611; 1 Mat. Dig. 376 note 3; 1 Parsons Cont. (4th ed.), 497; 2 Pars. Cont. 301, 305; 55 N. Y. 495; 8 Wheat. 174; 2 Leigh, 19; 2 Myl. & K. 492; 2 Meriv. 662; 3 Sim. 1; 2 Sto. Eq. Juris. §§ 1036 b., 1046, 1196; Lead. Cas. in Eq. (4th ed.) 1565, 1566; 6 W. Va. 17; Id. 36; 6 B. & C. 360; 13 Pick.

183; 7 Dana, 71; Pars. Cont. (5th ed.) 553; Taylor Ev. (6th ed.) 248, 254; M. & M. 182; Stephens Pl. (4th ed.) 142; 2 East, 339; Greenl. Ev. §§ 60, 63; Greasley Eq. Ev. (Am. ed.), 170, 173; Dan. Chy. Pr. (4th ed.) 862; Id. (3d ed.) 857; P. & P. in Eq. 71; Id. 55; 5 Abbott (U. S.) 59; 36 How. Pr. R. 138; 4 Rob. (N. Y.) 672; 17 Johns. 210; 17 Gratt. 187; 25 Gratt. 28; 21 Gratt. 73; 22 Gratt. 364; 26 Gratt. 563.

JOHNSON, Judge, announced the opinion of the Court:

This cause has given the Court much trouble; more to determine what questions ought not to be decided in the cause, than how to decide those which are manifestly proper for our decision. The record contains over four hundred and fifty printed pages, and nearly two hundred and fifty pages of printed argument are filed.

The first question that will be considered is: Were the proper parties before the court? It is insisted that the Western Transportation Company ought to have been a party to suits Nos. 1 and 2. The interest of the said company was that of a lessee. It has been frequently held, and the general rule is, that where proceedings are had to sell the fee in the land, it is not necessary to make the lessee of the land a party. *Lawley v. Walden*, 3 Swans. 142; 1 Dan. Chy. Pr. 201. The record discloses the fact, that the lease of the Western Transportation Company was from the defendant, The Pittsburgh and Steubenville R. R. Co., and was a lease of the railroad in the State of Virginia, authorizing the lessee to operate said railroad. The record clearly discloses the fact, that both The Pittsburgh and Steubenville R. R. Co. and the Western Transportation Company were foreign corporations created by the laws of Pennsylvania, and it is not pretended that either of said companies had any charter or license from the State of Virginia or this state to operate a railroad in the State of Virginia or this state; and without such charter or license neither could legally operate a railroad in this State. If they had such charter or license, then, as to all their property in this state they would be domestic corporations, and of course no attachment could lie against their property on the ground that they were foreign corporations. A foreign railroad corporation cannot emigrate from the State that gave it birth and do business in another state except by the charter or license of the state into which it proposes to extend its road. *Pittsburgh, Wheeling and Kentucky R. R. Co. v. Baltimore and Ohio R. R. Co.*, 17 W. Va. 812. Therefore in this proceeding we are compelled to regard the strip of land attached as we would any other real estate, and the said Western Transportation Company was not a necessary party to the suits or either of them.

It is also insisted that James Andrews should have been made a party because of some supposed interest in the commission for the exchange of bonds; but as it does not appear from the record,

that he had any such interest in those suits, and as he was examined in the suits as a witness and claimed no interest therein, he was not a necessary party.

It is further argued, that said Andrews ought to have been made a defendant to suit No. 1, because of an order that had been given him on a part of the fund claimed; but Andrews himself admits satisfaction under said order, as appears by his receipt filed in the cause.

It is claimed that the firm of J. S. King & Co. ought to have been made defendants to suit No. 1. It does not appear upon the face of the bill, that the said King & Co. had any interest in the cause. The bill alleges, that J. R. Cook & Co. as sub-contractors of J. S. King & Co. performed a large amount of labor in the construction of said railroad, furnished a large amount of materials for the same, amounting in the aggregate to \$65,108.71, and received sundry payments, amounting in all to \$28,642.85, leaving due and unpaid to J. R. Cook & Co. the sum of \$36,466.12, which balance, the said Pittsburgh and Steubenville R. R. Co. agreed to pay to said J. R. Cook & Co.; and to this allegation of the bill the said defendant answered, "that true it is, that the said Pittsburgh and Steubenville R. R. Co. did not agree to pay over to J. R. Cook & Co. any indebtedness owed by said company to said J. S. King & Co." It further appears from the record that the said J. S. King & Co. had a lease of the road, and when the Pittsburgh and Steubenville R. R. Co., to induce the sub-contractors under said King & Co. to wit: J. R. Cook & Co., to go on with the work, agreed to pay them the amount that King & Co. owed them, to further carry out its plans, it released the said King & Co. from any obligations under their lease or otherwise, and cancelled the lease.

J. R. Cook in his deposition says: "The object of the meeting in Philadelphia was, to devise some means to get rid of John S. King. He had been some time, two months, after his failure trying to raise money and to dispose of his contract in the east. He was asked upon what terms he would surrender his contract and lease of the road. He said he would do it conditioned upon his liabilities being met, not leaving him in debt. He said that the negotiation of the bonds paid his debts, where he had given his notes and pledged the bonds in security. He said he owed sub-contractors, but these bonds would not pay their claims and he wanted them paid; that was the principal condition on which he was willing to surrender his contract and lease."

The surrender was made, and the Pittsburgh and Steubenville R. R. Co. would have no right to a decree over against J. S. King & Co. according to the facts stated in the record for any indebtedness of theirs paid to J. R. Cook & Co. If there was any such liability on King & Co. to pay the Pittsburgh and Steubenville R.

R. Co., then said J. S. King & Co. would be necessary parties to this suit, but it seems to me from the facts disclosed in this record, that King & Co. were entirely relieved from any such liability, and they have no interest whatever in these suits or either of them, and therefore were not necessary parties.

It is claimed that the firm of J. R. Cook & Co., the assignors of the plaintiff, should have been made defendants in all the said suits. The general rule is, that where it is necessary to adjudicate the rights of an assignee, the assignor must be made a party to the cause, but to this rule there is the exception that when the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is neither doubted nor denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party. *Vance v. Evans et al.*, 11 W. Va. 342. The assignment of J. R. Cook & Co. clearly falls within the said exception to the general rule; and therefore they were not necessary parties to the suits or either of them.

It is insisted that the Holliday's Cove Railroad Company should have been before the court when the decree was rendered, as it is claimed it was a domestic corporation, and had been named in the bill in suit No. 3, and summons issued but not returned, and to render the decree in the absence of said defendant was an error for which the decree should be reversed. The Holliday's Cove Railroad Company was not made a party to the said suit, although mentioned in the bill and summons. For the same reason the Western Transportation Company was not made a defendant. If a person is not named in the bill, and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process; and though named in the prayer of the bill and in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill to which he could answer, and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest. *Mosely v. Cocke*, 7 Leigh, 224.

In the bill there was no reference whatever made to the Holliday's Cove Railroad Company, except that it prays that that company may be made a party to the bill, and as we have seen, if it had been under these circumstances served with process, it would not have been a party to the suit. But it is said, that it was a necessary party to the suit; and this court is asked to take judicial notice, not only that it is a domestic corporation, but of every provision in its charter, and that under its charter it acquired the particular "strip of land, and railroad track" attached in these causes. If it were conceded, that the court would take judicial

notice of every railroad charter and the provisions therein contained, which we do not here decide, yet clearly the court will not take judicial notice that a railroad company under its charter condemned or acquired title to any particular land or strip of land, upon which it locates its road; such a thing is not of that public notoriety, that every intelligent man is presumed to know it. If the court could therefore take judicial notice, that the Holliday's Cove Railroad Company was on the 30th day of March, 1860, chartered by the Legislature of Virginia, it will not take judicial notice, that said company acquired by purchase, or otherwise, the interest of the Pittsburgh and Steubenville Railroad Company in the strip of land, and railroad track attached in these causes. It is not pretended that there is any evidence in the record to establish such fact, if it exist. The pleadings do not mention such fact, and it therefore nowhere appears in the record, that the Holliday's Cove Railroad Company has any interest in these suits. We must treat the causes as though nothing but the land was attached, and not distinguish it from such a case. The railroad track being upon it, so far as this record discloses, could make no difference. The franchise of no road is included in this attachment. The defendant, the Pittsburgh and Steubenville Railroad Company, never had any license under the laws of West Virginia to operate a railroad in this state. It seems it acquired an equitable title to the land attached in some way, and perhaps built the track thereon. As far as this record discloses, it does not appear, and we cannot judicially know that any other railroad company is interested in the said strip of land and railroad track; and therefore it does not appear that the said Holliday's Cove Railroad Company is a necessary party to the said suit.

But, if it be a fact that the said company acquired the interest of the Pittsburgh and Steubenville Railroad Company by virtue of its charter, and that it was under its charter located on this particular strip of land, then it was a necessary party to said suits, and was vitally interested; and if it had been made a party, if thus interested, it could have raised the interesting legal question, whether a section of a railroad in full operation can be sold under legal process for the debts of the company, and all other questions affecting its interests. But, under the view we have taken of this case, that question, so elaborately and ably argued by the learned counsel, does not arise in these causes. But whatever interests legal or equitable, however acquired, the said Holliday's Cove Railroad Company, or any other company chartered by West Virginia, which may have succeeded to its rights and franchises, had at the commencement of these suits, will be wholly unaffected by the decree in these causes, or any sale made thereunder, they not being parties to these suits.

The greater part of the argument of counsel for the defend-

ant, the Pittsburgh and Steubenville Railroad Company, is to show, that the proofs in the case did not sustain the commissioner's report, and of the arguments for the plaintiff, that the proofs did sustain the commissioner's report. The account was a long and intricate one, and the evidence before the commissioner amounts to a volume, although, as I know from a careful inspection of the record, part of it is interesting, yet it must have been a laborious task to the circuit court, to hunt through seven or eight hundred pages of manuscript to ascertain, whether every finding of the commissioner was correct, in the absence of exceptions pointing out the particular matters excepted to.

This brings us to the consideration of the question whether the court was justified in overruling the exceptions to the report. In *McCarty et al. v. Chalfant et al.*, 14 W. Va. 531, this court held, that generally exceptions to reports of master commissioners partake of the nature of special demurrers; and if the report is erroneous, the party complaining of the report and excepting thereto must point out the error in his exceptions with reasonable certainty, so as to direct the mind of the court to it. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence on which they are founded. The first exception in that case was: "Because in the first statement of the accounts the commissioner reports John Chalfant indebted to McCarty \$78.99." The court held this exception would not require the court to examine the evidence to see whether the statement was justified by the evidence.

The principle settled in the last-mentioned case justified the court in overruling the 7th, 8th, 9th, 10th and 11th exceptions without looking into the evidence, as they are all substantially like the exception in *McCarty v. Chalfant*; just as vague and indefinite. It would be unjust to require a circuit court upon such an exception to go on a hunt for errors through hundreds of pages of manuscript. If he was required so to do, a commissioner, no matter how intricate the account, would be of little aid to the court. If by merely endorsing upon the report in substance, "The within report is not sustained by evidence," is to put the burden on the judge to examine every particle of evidence, we may as well dispense with commissioners altogether.

The first exception is, that the commissioner does not report that the claims were due at the date of the attachment. In the absence of evidence to the contrary it would be assumed that the commissioner did so find; but in these causes, I think, he does in effect find, that the debts were due when the first suit was instituted.

The second exception is, that the claim of J. R. Cook & Co. against J. S. King & Co. is illegal and void, and constitutes no

claim upon the defendant. This exception is vague; but if it be considered good, the answer of the defendant, "that true it is, that the Pittsburgh and Steubenville Railroad Company did agree to pay over to J. R. Cook & Co. any indebtedness owing by said company to J. S. King & Co." is a complete answer to the exception, because, as disclosed by the record, one of the inducements of J. R. Cook & Co. to proceed with the construction of the bridge was, that the company should pay to them the indebtedness of J. S. King & Co., and this was a valid consideration. *Winkler v. C. & O. R. Co.*, 12 W. Va. 699.

The third exception is the allowance of the same account, exhibit "A," that shows the indebtedness of J. S. King & Co. to J. R. Cook & Co., the sub-contractors, on the ground that the said J. R. Cook & Co. never had any contract whatever with the said railroad company for the construction of their work, or any part thereof. This is a mistake, as the contract is clearly proved; and it is also proved, that to induce J. R. Cook & Co. to go on with the work, the said railroad company assumed to pay to said J. R. Cook & Co. the indebtedness of J. S. King & Co.

The fourth exception is to the allowance of commission on exchange of bonds, and is composed of a single item. We think the report as to this item, so far as adopted by the circuit court, is sustained by the evidence.

The fifth exception is to the allowance of claims set forth in exhibit "D," on the ground that there is no evidence to show, that the certified estimates therein specified were, at the time the suit was brought, the property of the plaintiff. But it is unnecessary to consider this exception, as it was sustained by the circuit court, and there was no allowance made of certified estimates.

The sixth exception it is unnecessary to consider, as the objection to the report on the ground therein set forth (whether a good objection or not we do not decide,) was removed by consent of parties.

This court is asked on its own motion to quash the attachment in the Hancock County cause, on the ground that the affidavit, on which it is founded is fatally defective. That attachment we cannot consider in this appeal, because the court below did not pass upon its validity, but sent that cause to rules, to bring the legal title to the property attached before the court, before it would order a sale thereof.

It is alleged as error, that these suits and each of them were set for hearing and the decree rendered, in the absence of important papers made exhibits in the bills. It is a sufficient answer, that the defendant did not call for the production of the said exhibits, and in its answer did not deny their existence, or contest their validity, the defendant cannot in the appellate court object to their non-production.

It is insisted, that the court erred in entering a personal decree upon the demands set up in suit No. 3, when the trustees, who held the legal title, were not before the court. Where an attachment is sued out against a non-resident corporation, which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such non-resident corporation, which appears in the cause, but the attached property will not be sold in the absence of the trustees, who hold the legal title; they must either be served with process, or if non-residents, an order of publication must issue against them and be duly published. *Baker v. Oil Tract Co.*, 7 W. Va. 454; *Cirode v. Buchanan*, Adm'r, 22 Gratt. 205.

For the foregoing reasons the decree rendered in these consolidated causes, on the 22d day of February, 1877, is affirmed with costs and damages.

The other judges concurred.

Decree affirmed.

HENEN, ADM'R,

v.

THE BALTIMORE AND OHIO R. R. Co.

(17 *West Virginia Reports*, 881.)

An order of a state court removing a case at law to the circuit court of the United States under section 639, page 114, of the Revised Statutes of the United States, 2d ed., is reviewable by the Supreme Court of Appeals of this state by writ of error, and upon such review said Supreme Court of Appeals may reverse or affirm such order, as justice and the law may require in the opinion of such court.

Where a petition is filed in a state court praying the removal of a case from such court to a circuit court of the United States under said section 639 of the said Revised Statutes, the state court ought not to receive the bond offered by the petitioner, unless the condition of the bond so offered contains the material parts prescribed and required by said section in such a case.

A railroad corporation may have an existence in more than one state, if chartered or licensed to build its road in more than one state.

The Baltimore and Ohio Railroad Company is a domestic corporation of this state and liable to be sued here; and the court will take judicial cognizance of that fact. *Hart v. The Baltimore and Ohio Railroad Company*, 6 W. Va. 336.

When such company is issued in the courts of this state by a citizen thereof, such suit cannot be removed into the circuit court of the United States for the district of West Virginia, in such case said 639th section of said Revised Statutes does not apply to or embrace the said company.

Writ of error to an order of the circuit court of the county of Wetzel made on the 18th day of October, 1879, in an action in said court then pending, wherein

John Henen, administrator, was plaintiff and the Baltimore and the Ohio Railroad Company was defendant, allowed upon the petition of said Henen.

Hon. A. B. Fleming, judge of the second judicial circuit, made the order complained of.

HAYMOND, Judge, furnishes the following statement of the case :

This is an action of trespass on the case brought by the plaintiff, John Henen, administrator of Jane Smith, deceased, against the defendant for the killing of plaintiff's intestate by the defendant's servants driving a steam engine over her at a public crossing on its railroad, in an unlawful, careless, and negligent manner on the 10th day of February, 1879. The suit was brought in the circuit court of Wetzel County, State of West Virginia, on the 28th day of July, 1879. The declaration contains two counts. The damages claimed in the declaration are \$5,000.00.

It appears, that on the 18th day of October, 1879, the defendant, by its counsel, appeared in said circuit court and filed its petition to the said circuit court, which is as follows :

"To the Honorable A. Brooks Fleming, Judge of the Circuit Court of Wetzel County in the State of West Virginia :

"The petition of the Baltimore and Ohio Railroad Company respectfully represents that your petitioner was incorporated and made a body politic by an act of the General Assembly of the State of Maryland, by an act entitled 'An act to incorporate the Baltimore and Ohio Railroad Company,' passed on the 28th day of February, 1827; that the purpose of said act was, as sufficiently indicated by its title, to secure the construction and working of a railroad from the city of Baltimore, in the State of Maryland, westward through said State, the (then) State of Virginia, and perhaps in part through the State of Pennsylvania to some point on the Ohio river; that said charter was duly accepted by the shareholders of said company and said company regularly organized under the said charter, and the said road has been since constructed and is now worked and operated from Baltimore, through the State of Maryland, and through the (then) State of Virginia, now the State of West Virginia, to the city of Wheeling, in the county of Ohio, in the said last named state; that a suit has been recently instituted against your petitioner as such corporation as aforesaid, in the circuit court of Wetzel County, in the said State of West Virginia, by one John Henen, administrator of Jane Smith, deceased, being an action of trespass on the case, for the purpose of recovering against your petitioner damages claimed to amount to and laid at the sum of \$5,000.00 for injuries of a personal nature to and the alleged killing of the said Jane Smith, deceased, for which the plaintiff claims that your petitioner is responsible; that said suit is now pending and undetermined in your Honor's said court, and

the matter in dispute exceeds the sum of \$500.00; that your petitioner has not heretofore entered an appearance in said cause, and desires to remove the same for trial from your Honor's said court into the next circuit court of the United States to be held in the district of West Virginia, of which district the said Jane Smith, at the time of her death was, and the said plaintiff, at the time of bringing said suit was, and still is, a citizen and resident. And to that end your petitioner now here offers to give good and sufficient security for entering in such circuit court of the United States on the first day of its next session copies of said process against it, and for its then appearing and doing all and everything required by law in the premises, and prays, that said cause may be so removed from the said circuit court of Wetzel County, West Virginia, into the next circuit of the United States for the said district of West Virginia, to be therein heard, tried and determined, and that your Honor's said state court will proceed no further in said cause, and as in duty bound your petitioner will ever pray, etc.

"BALTIMORE AND OHIO RAILROAD Co.,

"By its Attorneys.

"Bogges and McCoy, Attorneys."

Upon the filing of said petition the circuit court made and entered an order in the cause as follows:

"John Henen, administrator of Jane Smith, deceased, plaintiff, v. The Baltimore and Ohio Railroad Company, defendant.—In case.

"This day came the plaintiff, by his attorney, and thereupon came also the defendant, by its attorney, and filed here in court its petition praying that this cause may be removed by order of this court into the next circuit court of the United States to be held for the district of West Virginia, to be therein tried and determined, and that this court will proceed no further therein. To the filing of which petition the plaintiff, by his counsel, objected, which objection, on consideration by the court, is overruled, and the said petition was received by the court and ordered to be filed. And thereupon the said plaintiff filed here in court an answer in writing to said petition of the defendant. To the filing of which answer, the defendant, by its counsel, objects and excepts to the same as improper and insufficient. Whereupon, on consideration, the court overrules the defendant's said objection, and allows the said answer to be filed; and the matter of the defendant's said petition having been fully considered by the court, together with the evidence and argument of counsel, therefore it seemeth to the court here that said defendant is entitled, under the law, to have the prayer of the said petition, and said cause removed, as prayed for. Thereupon it is ordered, that upon the defendant, or some one for it, executing and filing bond in the penalty of \$500.00, with condition to enter in the next circuit court of the United States for

the District of West Virginia, on the first day of its next session, copies of the process in said cause, and for its then and there appearing and doing whatever else may be required by law in the premises, this cause shall be removed into the said circuit court of the United States. And the said defendant thereupon tendered here in court a bond in such penalty, executed by J. W. Bradshaw, P. McDonnell and J. W. McCoy, with conditions as above required, which is received by the court and ordered to be filed; and it is accordingly considered by the court that this court proceed no further in said cause, and that the same be removed into the said circuit court of the United States to be therein heard, tried and determined.

The answer to said petition filed by the plaintiff and mentioned in said order is as follows:

"IN THE CIRCUIT COURT OF WETZEL COUNTY.

"JOHN HENEN, administrator of Jane Smith, dec'd, v. THE BALTIMORE AND OHIO R. R. Co.—Trespass on case.

"To the petition of defendant to remove this cause to the circuit court of the United States, the plaintiff replies and answers as follows: That the defendant does not operate or own its railroad in the State of West Virginia by virtue of any Maryland law, but has its existence in this state, and is a corporation and has constructed its road within this state, and operates it all by virtue of sundry acts of the Legislatures of Virginia and West Virginia, and the defendant is under these laws a corporation of this state, and was so created within this state by virtue of said laws. Plaintiff denies that defendant is a Maryland corporation within the act of Congress under which they seek to remove this cause.

Plaintiff further says, that for the purpose of this suit the defendant is a resident of this state, and, therefore, prays that the petition of defendant be rejected.

"JOHN HENEN, Adm'r.

"By J. D. Ewing, Att'y."

The bond filed by defendant, and mentioned in the said order is as follows:

"Know all men by these presents, That we J. W. Bradshaw, P. McDonnell, and J. W. McCoy, as sureties for the Baltimore and Ohio R. R. Co., are held and firmly bound unto John Henen, administrator of Jane Smith, deceased, in the sum of five hundred dollars, to be paid to the said John Henen, administrator of the said Jane Smith, deceased, his executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this the 10th day of October, 1879.

"The condition of the above obligation is such, that, whereas, in

a cause pending in the circuit court of Wetzel County, West Virginia, being an action of trespass on the case in which the said John Henen, administrator of Jane Smith, deceased, is plaintiff and the said Baltimore and Ohio R. R. Co. is defendant, the said defendant has filed its petition praying that the said cause may be removed into the next circuit court of the United States to be tried and determined, which prayer has been granted on terms of giving this bond: Now, if the said Baltimore and Ohio R. R. Co. shall file and enter in said circuit court of the United States for the district of West Virginia copies of said process in said cause on the first day of the next session of said Court, and shall then and there appear and do what may be by law required to be done in the premises, then this obligation to be void, else to remain in full force and virtue.

"J. W. BRADSHAW, [Seal.]

"P. McDONNELL, [Seal.]

"J. W. McCoy. [Seal.]"

To the said order of the circuit made in this case on the said 18th of October, 1879, a writ of error was allowed the plaintiff on the 22d day of November, 1879, upon his petition and assignment of error by this court without bond and security being required; and in this way the said order is before this court for review and decision.

Ewing and Riley, for plaintiff in error, cited the following authorities:

15 W. Va. 362; 12 Gratt. 655; 1 W. Va. 308; 3 W. Va. 319; 15 W. Va. 609; 13 Wall. 270; 12 Wall. 65; Rev. Stat. U. S. § 721; 2 Black 599; Id. 532; 24 How. 264; Id. 364; 7 How. 767; Id. 812; 5 How. 64; Id. 139; 11 How. 297; 14 How. 458; 22 How. 1; 14 Pet. 56; 5 Cranch, 22; 9 Cranch, 87; 1 Wheat. 279; 2 Wheat. 316; 12 Wheat. 153; 1 Pet. 604; 6 Pet. 291; 9 Cent. Law Jour. No. 24, p. 467; 29 Gratt. 431; Acts 1872-3, ch. 17; Acts 1877, ch. 44; 2 Munf. 336; 3 Munf. 458; 4 Munf. 383; 6 Rand. 349; 8 Leigh, 88; 1 Am. 166; 8 Am. 583; 13 Am. 285.

C. Boggess, for defendant in error, cited the following authorities:

15 W. Va. 479; 10 Gratt. 1; 8 W. Va. 63; 8 Blatchf. 153; Dillon Rem. Caus. 75; 22 Wall. 250; 5 Blatchf. 336; 13 Pet. 512; 2 How. 497; 16 How. 314; 20 Wall. 453; 8 Blatchf. 243; 22 Wall. 454; 19 Wall. 214; 6 Otto, 199; 16 How. 329; 2 Wall. 445; 4 Otto, 535; 12 Gratt. 655; 3 W. Va. 319; 1 W. Va. 308; 15 W. Va. 609; Ram Leg. Judgt. ch. 5.

HAYMOND, JUDGE, announced the opinion of the court:

In considering this case I deem it proper to first consider, whether the order of the circuit court made in this case on the 18th day of October, 1879, is such an order made in the case as

that the same may properly be reviewed by writ of error by this court under the law. As it seems to me, we are not without very respectable authority bearing on this question. In the case of *Akerly v. Vilas*, 24 Wis. 165 and 1st American Reports, 166, decided at February term, 1869, it was held, that "an order of a state court, transferring a cause to the Federal court under the act of Congress of March 2, 1867, is an appealable order and the state courts have jurisdiction to hear and determine the appeal."

Judge Paine who delivered the opinion of the court in that case, at pages 167, 168, 167, 170 and 171, says: "If there was no law authorizing the removal—and there was none, if either of the positions taken by the appellant is true—then the jurisdiction of the state court remained unimpaired, and there was no obstacle in the way of its exercise, except the erroneous order that the case be removed. And the idea, that the appellate power of the state court cannot be invoked to correct this error; that it remains in abeyance, suspended by such an unauthorized application, that the court which has jurisdiction must decline to exercise it, until the court which has none shall see fit to disclaim it, is one that cannot be supported upon any reasoning.

"But if the right of appeal exists in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and determine the appeal cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed.

"Nothing is better settled in legal practice than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the expression of our statute that allows an appeal from any order which prevents a judgment from which an appeal might be taken. It is the common law practice of all courts. The case of *The Mayor v. Cooper*, 6 Wall. 247, cited by the respondent, is one where the Supreme Court of the United States reviewed such an order made by the United States circuit court. It is true, in that case the order or judgment of dismissal was reversed, the court holding that the circuit court had jurisdiction. But if they had held differently they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice; and this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely a decision upon that application itself. And that decision, whether the power be exercised by a subordinate or an Appellate Court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the neces-

sity of the case, has the power to determine whenever presented; and whoever invokes the exercise of this power on the part of a subordinate tribunal of the State must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence; and one of those conditions is, that an order made upon such an application is appealable.

"That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson v. Leland et al.*, 22 How. (U. S.) 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate courts. And the chief justice delivered the opinion of the court, 'that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court has jurisdiction on such appeal.' The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal was wholly independent of the actual jurisdiction of the lower court to try the action upon its merits. And if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed that the State court is divested by the presentation of a proper application for removal. It is true, that if the Appellate Court should sustain the jurisdiction of the State tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction has ceased or continued, is not an exercise of it, any more when made by the Appellate Court than it was when made by the subordinate court.

"Indeed the right and the duty of the State courts to exercise such appellate power, has been expressly decided by the Supreme Court of the United States, in *Kanouse v. Martin*, 15 How. 198. The Court of Common Pleas in the city of New York had denied an application for removal, and afterward proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the Superior Court, which affirmed the judgment. And the Supreme Court of the United States reversed the judgment on the ground that the Superior Court erred, not in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the Common Pleas for refusing the application for removal. They say: 'The error of the Superior Court was therefore an error occurring in the exercise of its jurisdiction, by not giving due effect to the act of Congress under which the plaintiff in error claimed,' etc. And it made an order remanding the case to the Superior Court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the Superior Court to reverse the judgment of the Common Pleas.

"And yet we are referred to this case, by the respondent's counsel, to support their assertion that this court will stultify itself by taking jurisdiction of this appeal.

"This court certainly is not oblivious of the fact, that, if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment, after such further trial as may be necessary, the Supreme Court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse v. Martin*, as counsel suggested. But we feel very confident that if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal.

"I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon v. Longest*, 16 Pet. 104, cannot, in any event, be applicable to the exercise of such appellate power. But it is, perhaps, doubtful whether the same language would now be used by that court. The subsequent case of *Kanouse v. Martin* seems studiously to avoid it, and makes no suggestion that the judgments of the Court of Common Pleas and of the Superior Court were void for want of jurisdiction, but speaks of them, throughout the opinion, as merely erroneous, and the same view is also supported by the case of *Hadley v. Dunlap*, 10 Ohio St. 1. I come therefore to the conclusion, that this order is appealable, and that it is the duty of this court, from which it cannot shrink, to proceed to a determination of the questions presented."

The act of March 2, 1867, will be found in the acts of Congress of 1866-7, pp. 558 and 559.

The principle involved in the above-named case and discussed by Judge Paine in delivering the opinion of the court is the same now under consideration in this case. See case of *Taylor Strauder v. The State of West Virginia*, 9 Otto —, in connection with *Kanouse v. Martin*, supra.

In the case of *State ex rel. Coens v. The Judge of the Thirteenth Judicial District*, 23 La. An. 29, 8 Am. Rep. 583, it was held, that "The application of a party to remove a cause to the Circuit Court of the United States is analogous to a plea to the jurisdiction of the State court, and when granted, the party against whom it is granted has a right to appeal. The case would be different if the application to remove is refused. In the latter case no irreparable injury would follow, and the appeal would not be allowed (see note 7, Am. Rep. 507)." In the said case in 23 La. An. 29 supra, Judge Howe in delivering the opinion of the court, at page

584, 8 Am. Rep. says: "We had occasion to say, in the case of *Rosenfield v. The Adams Express Company*, 21 An. 233, that an application to remove is analogous to a plea to the jurisdiction, and that if granted, an appeal would lie. The remark was, perhaps, not entirely necessary to the decision of that case, but we do not find any reason, on the most careful examination, to doubt its correctness. In *Beebe v. Armstrong*, 11 Mart. 440, this court entertained such an appeal, and reversed the order of removal. In *Duncan v. Hampton*, 12 Mart. 92, a similar appeal was entertained, and the question of the right of appeal seems to have been discussed; for alluding to a difference of opinion on the merits, Judge Matthews said: 'As we are unanimously of opinion that the judgment (of removal) rendered by the district court is a decision from which an appeal ought to be sustained, it is unnecessary to investigate that part of the cause.' Judge Martin was in favor on the merits of reversing the order of removal. There are three cases where similar appeals were entertained: *Louisiana State Bank v. Morgan*, 4 N. S. 344; *Fritz v. Hayden*, Id. 653, and *Fisk v. Fisk*, Id. 676. In the first of these the order of removal was reversed. In *Higgins v. McMicken*, 6 N. S. 712, the court declared, that it had several times entertained jurisdiction of 'such appeals, and added, such decisions or judgments were properly considered as final in consequence of sustaining the petitions for removal. A request to change the jurisdiction of a suit from a State court to one of the United States, under the law of Congress is analogous to a plea to the jurisdiction of the court in which the proceedings commenced; and when a removal is ordered, the plaintiff would be without remedy against such order, unless by appeal.' In *Stoker v. Leavenworth*, 7 La. 390, a similar appeal was entertained, and the 'judgment' of removal affirmed; and the same action was had in *Franciscus v. Surget*, 6 Rob. 33. We cannot undertake to disturb this well-settled jurisprudence."

See as bearing upon the subject the opinion of the court in *Beery v. Irack*, 22 Gratt. 484, 12 Am. Rep. 539.

In the case of *Burson v. The National Park Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285, it was *held*, that "In an action commenced by a citizen of another State against a citizen of Indiana, the court on application and after a trial in which the jury disagreed, ordered the cause to be removed into the circuit court of the United States under the acts of Congress. *Held* (1), That the order was appealable; (2) that the cause could be removed at any time before another trial; and that the acts of Congress allowing a plaintiff to remove a cause into the Federal courts were constitutional."

In this case Judge Deveney in delivering the opinion of the court, at page 286 American Rep. says: "When, as in this case, an order has been made by one of such courts transferring a cause to

the courts of the United States, courts of another and distinct government, or when such an order has been properly applied for and improperly refused, it would seem to be the duty of this court, on an appeal properly taken to it, to decide upon the correctness of such rulings. If the ruling is found to be erroneous, it should be reversed. If it be found to be correct, it would be the duty of the court to remand the cause to the inferior court with instructions to carry out the order. But was the order or judgment of the common pleas final in such sense as to authorize an appeal to this court? The order put an end to the cause, so far as the State courts are concerned, if it shall be allowed to remain in force and be carried out. If the party opposing such order cannot appeal at that stage of the case, he can never appeal to this court. It is our opinion, that such an order or judgment is so far final, as to authorize an appeal to this court. When such an order is applied for and refused, the cause remains pending in the court, and such refusal is in no sense a final order or judgment. But if the point has been properly reserved, the question can be brought to this court after final judgment and then decided by this court, as was done in *Skeen v. Huntington*, 25 Ind. 510. . . . It is true, that the act of Congress provides that when the application has been made in the proper manner for the removal, the State court shall proceed no further in the cause. But this does not settle the question. The question is not, shall the subordinate State court proceed no further? but may the party who has thus been prevented from having the cause tried in the court in which the suit was pending, appeal to this court? If he cannot, when and to whom is he to look for a correction of the most flagrant errors and abuses resulting from the action of the subordinate court?"

The judge overrules the decision in the case of *The City of Aurora v. West*, 25 Ind. 148, and cites *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 166; *Whiton v. the Chicago and Northwestern R. R. Co.*, 25 Wis. 424, 3 Am. Rep. 101; *The Home Life Insurance Co. v. Dunn*, 20 Ohio St. 175, 5 Am. Rep. 642; *Kanouse v. Martin*, 15 How. (U. S.) 198.

The facts upon which a petitioner bases his right to the removal of a case from a State to a Federal court, must be made to appear to the satisfaction of the State Court, but no particular mode is prescribed in which the facts are to be made to appear. *People v. Superior Court*, 34 Ill. 356. And I think I may well add, that in the cases where bond and security are required to be given under the provisions of the 639th section, p. 114, 2d ed. of the Revised Statutes of the United States (under which the removal was asked and made in the case at bar), the State court has the right to pass upon the sufficiency of the bond tendered, in its contents, and also the sufficiency of the sureties thereto. The State court has a right also to judge of the sufficiency of the petition. The Supreme Court of

the United States in the case of *Armory v. Armory*, 5 Otto, 186, and in *Insurance Co. v. Peckham*, *held* that the State court properly refused to remove, when the citizenship of the parties being of different States did not appear from the pleadings, and was not sufficiently alleged in the petition for removal. In case of *Railroad Co. v. McKinly*, 9 Otto, 148, and *Vornevar v. Bryant*, 21 Wall. 41, the Supreme Court of the United States has affirmed the rulings of the State court refusing to allow removals where there had been a trial or after judgment, showing that it is conceded by that court that the State courts have the right to refuse the removal where the records and proceedings do not show a proper case for removal. In the case of *The P. W. & Ky. R. R. Co. v. B. & O. R. R. Co.*, decided at the same time as this case, it is *held*: "That the facts upon which a petitioner bases his right to the removal of a case from a State to a Federal court must be made to appear to the satisfaction of the court, before the order of removal can be made," and that "the petition becomes a part of the record and should state facts, which taken in connection with such as already appear, entitle the petitioner to a removal of the case."

Under the foregoing authorities and upon principle it seems to me that the order of the circuit court made in this cause on the 18th day of October, 1879, is reviewable by this Court by writ of error, and that this Court upon reviewing said order may affirm or reverse the same, as to it may seem proper and right from the law, facts and circumstances to it appearing. While I feel it to be my duty, as it is my desire, to concede to the Federal courts the jurisdiction and powers to which they are justly and rightfully entitled, I feel it to be my duty to claim for the courts exercising authority under the State government the full measure of jurisdiction and authority which pertains or belongs to them, as is substantially said by Judge Downey in the case of *Burson v. The National Park Bank of New York*, *supra*.

I will now proceed to consider the errors assigned by the plaintiff in error in his petition for a writ of error, etc. They are as follows: "1st. The order of removal based on the erroneous judgment, that the defendant is a foreign corporation. 2d. The application is insufficient, there being no proof of the sufficiency of the bond. 3d. Court erred in allowing defendant to file its petition over plaintiff's objections."

I deem it proper to first consider the plaintiff's second assignment of error; and in doing so it is material, in order to arrive at a correct conclusion, to consult so much of the act of Congress, under which the application for the removal of the case was made, as is applicable thereto. As before remarked, the act of Congress, under which the application for the removal was made, and under which the removal was made by the circuit court, is section 639 of the Revised Statutes of the United States, 2d ed. p. 114. The section,

so far as relevant to this case, provides, "that any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of \$500.00, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district, where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section—1st. When the suit is against an alien, or is by a citizen of the State wherein it is brought and against a citizen of another State, it may be removed on the petition of such defendant filed in said State court at the time of entering his appearance in said court. . . . In order to such removal, the petitioner in the cases aforesaid must at the time of filing his petition therefor offer in said State court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause, or in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged."

By reference to the order of the circuit court made on the 18th day of October, 1879, it will be seen that the order about the middle thereof commences and continues as follows: "Thereupon it is ordered, that upon the defendant, or some one for it, executing and filing bond in the penalty of \$500.00, with condition to enter in next circuit court of the United States, etc., . . . copies of the process in said cause, and for its then and there appearing and doing whatsoever else may be required by law in the premises, this cause shall be removed into the said circuit court of the United States. And the said defendant thereupon tendered here in court a bond in such penalty, executed by J. W. Bradshaw, P. McDonnell and J. W. McCoy with conditions as above required, which is received by the court and ordered to be filed; and it is accordingly considered by the court that this court proceed no further in said cause, and that the same be removed into the said circuit court of the United States, to be therein heard, tried and determined."

The condition of the bond so tendered or offered is as follows: "Now if the said Baltimore and Ohio Railroad Company shall file and enter in said circuit court of the United States for the District of West Virginia copies of said process in said cause on the first day of the next session of said court, and shall then and there

appear and do whatever may be by law required to be done in the premises, then this obligation to be void, etc.”

It appearing that the bond was tendered by the defendant, and that the court “received” the bond and ordered it to be filed, it seems to me that it must be considered by this court that the court below passed upon the sufficiency of the sureties thereto, and held them upon proper enquiry to be “good and sufficient.” But I am also of opinion that the court did not require from the defendant a bond with such conditions as the act of Congress prescribes and requires in a case like the one at bar. The bond offered and received by the court does not contain such condition as the act of Congress prescribes and requires in such a case. It will be perceived at a glance on comparing the condition of the bond with that required and prescribed by the act of Congress, that the condition contained in the bond only contains a small part of the condition prescribed and required by the act of Congress in such a case. The condition of the bond is so defective and deficient that it is only necessary to mention the defect for it to be seen and acknowledged.

Entertaining these views I am clearly of opinion that the court below erred in accepting and receiving said bond, as being sufficient in its contents, when in truth and fact the condition of the bond was and is manifestly materially defective and deficient.

I will now proceed to consider the plaintiff's first and third assignments of error together, as they substantially raise the same question. In the case of the P. W. & Ky. R. R. Co. v. the Baltimore & Ohio R. R. Co. this Court *held*, “A railroad corporation may have an existence in more than one State if chartered or licensed to build its road and do its business in more than one;” also that “the Baltimore and Ohio Railroad Company is a domestic corporation in the State of West Virginia and as such is liable to be sued here.” And that “when sued in the courts of this State by a citizen thereof, such suit cannot be removed into the circuit court of the United States, as that court has no jurisdiction of such a case.” The meaning of this is in part at least that the Baltimore and Ohio Railroad Company is under the legislation and the facts in relation thereto, of which the court may take judicial notice, a citizen of the State of West Virginia, and as such may sue and be sued in the courts of this State, and does not come within the true meaning and intent of said act of Congress. And I will add that the Court will take judicial notice of that fact. (*Hart v. the Baltimore & Ohio Railroad Co.*, 6 W. Va. —.) In other words, that said act of Congress does not embrace the said Baltimore and Ohio Railroad Co. when sued in a court of this State by a citizen thereof, which it seems to me is correct and just. This question has been so elaborately considered in the opinion of the court in the case P. W. & Ky. R. R. Co., that I deem it un-

necessary to do more in this opinion than refer to so much of the opinion of the court in that case as relates to the said question and supports the principles therein decided touching said question. To attempt to do more here would be a work of supererogation.

For the foregoing reasons there is error in the said order of the circuit court of the county of Wetzel made in this case on the said 18th day of October, 1879; and the same must be reversed and the plaintiff in error recover against the defendant in error his costs about the prosecution of his writ of error in this case in this court, and the case be remanded to the said circuit court of Wetzel county for further proceedings therein to be had according to law.

The other judges concurred.

Order reversed. Case remanded.

See note 7, *Am. & Eng. R. R. Cas.* 21.

CHICAGO AND A. R. CO.

v.

WIGGINS FERRY Co.

(*Advances Case, U. S. Supreme Court. January 29, 1883.*)

A suit does not arise under the constitution and laws of the United States where the public acts of one State are to be construed in an action pending in a court of another State.

IN error to the Circuit Court of the United States for the Eastern District of Missouri.

Chester H. Krum and C. Beckwith, for plaintiff in error.

S. T. Glover and J. R. Shepley, for defendant in error.

WAITE, C. J.—This is a suit begun in a State court of Missouri by the Wiggins Ferry Company, an Illinois corporation, against the Chicago and Alton R. R. Co., another Illinois corporation, to recover damages for the breach of a contract by which, as is alleged, the railroad company bound itself not to employ any other means than the ferry company's ferry for the transportation of passengers and freight, coming and going on its railroad, across the Mississippi and St. Louis. The railroad company defends on the ground, among others, that if the agreement actually entered into by the parties contains by construction any such provision as is claimed, it is in violation of the laws of Illinois, and in excess of the corporate powers of the company as an Illinois corporation. To avoid the effect of this defence the ferry company sets up, by way of estoppel, a judgment in another suit in a State court of

Missouri, between the same parties, where precisely the same question was raised on the same contract, and in which it was decided that the railroad company did have the corporate authority under the laws of Illinois to make the contract. As soon as the pleadings in the case developed this issue, the railroad company petitioned for the removal of the suit to the circuit court of the United States for the Eastern District of Missouri, the proper district, on the ground that "full faith and credit has not been given to the public acts of the State of Illinois by the Supreme Court of the State of Missouri in the adjudication aforesaid, and that by reason of the facts herein set forth, and of such adjudication, and the pleading thereof as an estoppel, in the manner set forth in the plaintiff's amended petition, this suit is one arising under the constitution and laws of the United States." The facts set forth in the petition were the charter and laws of Illinois, which governed the powers of the railroad company as an Illinois corporation.

The State court, on the filing of the petition for removal, accompanied by the necessary bond, stopped proceedings, but the circuit court, when the record was entered there, remanded the cause.* From an order to that effect this writ of error has been taken, and is now for hearing on the merits under the operation of rule 32, adopted at the last term, with a view to facilitating the final determination of questions of removal under the act of March 3, 1875, c. 137 (1 Supp. Rev. St. 173).

In our opinion this is not a suit arising under the constitution or laws of the United States, within the meaning of that term as used in the removal act. If the courts of Missouri gave a wrong construction to the laws of Illinois in the judgment set up, as an estoppel, that error cannot be corrected by means of a transfer of this suit from the State court to the circuit court of the United States. So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States, any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether as a judgment it operates as an estoppel does not depend on the constitution or laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri. The public acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court

* See 11 Fed. Rep. 884.

in the judgment which has been rendered, that may entitle the railroad company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made.

Another ground taken in support of the jurisdiction of the circuit court upon the removal is, if we understand the argument of the counsel for the plaintiff in error, that the laws of Illinois, rightly construed, prohibit such a contract as it is alleged has been made, and as the Missouri court decided the other way when the former judgment was rendered, a transfer may be made so as to avoid a like error in this suit. The question thus presented is, not what faith and credit must be given the public acts of Illinois in Missouri, but what the public acts of Illinois, when rightly interpreted, mean. That does not depend on the constitution or laws of the United States, but on the constitution and laws of the State alone.

It is not even alleged in the petition for removal, or claimed in argument, that the courts of Illinois have as yet actually given the statutes in question any such construction as it is contended they should have. The most that can be insisted upon from all the allegations is that, on account of what has been done in other cases, the railroad company expects, when an opportunity occurs, the courts of Illinois will decide that the laws of that State gave the company no power to bind itself in the way the Missouri court has determined it did. So that the position of the railroad company on this application seems to be that, while the questions arising on the effect of the public acts are apparently open in the courts of Illinois, and nothing has been done which, even on the principles of comity, can bind the courts of Missouri, a suit pending in a Missouri court may be removed to a court of the United States, because the Missouri court, on a former occasion, construed a public law of Illinois, which is involved, differently from what it should have done. To allow a removal upon such grounds would be to say that a suit arises under the constitution and laws of the United States whenever the public acts of one State are to be construed in an action pending in a court of another State. Clearly this is not so.

Even if it be true, as is contended by the counsel for the plaintiff in error, that a suit can be removed as soon as a Federal question becomes involved, it is sufficient to say that in this case such a question has not arisen. Until the Missouri court fails in this suit to give full faith and credit to the public acts of Illinois, no case has arisen to which the jurisdiction of the courts of the United States can attach, and then only for the correction of the errors that have been committed. It is not enough that in other cases decisions have been made which, if followed in this, will be erro-

neous. Until the error has actually been committed in this case, a Federal question has not become involved. The presumption in all cases is that the courts of the States will do what the constitution and laws of the United States require, and removals cannot be effected to the courts of the United States because of fear that they will not.

The order remanding the cause is affirmed.

See S. C. 5, Am. & Eng. R. R. Cas. 1 and note.

THE LEHIGH COAL AND NAVIGATION CO.

v.

THE CENTRAL R. R. CO. OF NEW JERSEY.

(85 *New Jersey Eq. Reports*, 349.)

An insolvent corporation had been in the hands of this court since 1876, and its railroad operated through a receiver appointed by the chancellor. The injunction restraining the managers of the corporation from interfering with or exercising the franchises of the company was modified in order to allow the stockholders to hold an election for directors, and thereunder certain stockholders made a written application to the existing board of directors to order an election of new directors, at the time designated by the by-laws for holding such annual election. This the directors refused to do. On application to the chancellor, *held* that he might order an election of directors by the present stockholders, and so ordered; such election to conform as nearly as possible to the requirements of the by-laws of the company.

MOTION for an order for an election of directors of the defendant. On petition and supplemental petition of Edward C. Knight, who claims to be the owner of three thousand shares of the stock.

Mr. A. G. Richey, Mr. J. D. Bedle, and Mr. James E. Gowen, of Pa., for the motion.

Mr. T. N. McCarter, for certain stockholders, contra.

Mr. B. Williamson, for the directors.

THE CHANCELLOR.—After the making of the order modifying the injunction so as to permit the stockholders to hold an election for directors, the petitioner, by written application to the existing board, requested them to order an election. They, however, declined to comply with the request. The order was made on the 15th of April last. The time fixed by the by-laws (the charter is silent on the subject) for holding the annual election of directors is the Friday next before the second Monday of May. Upon the refusal, certain of the stockholders gave notice, under the fifty-first section of the act concerning corporations, of the holding of an election. This court, for satisfactory reasons, prevented that elec-

tion. A supplemental petition was then filed, setting forth the fact of the refusal on the part of the directors to hold an election, and praying this court to order the election, and motion is now made thereupon in behalf of the petitioner and other stockholders holding large amounts of the stock. The board appear by their counsel and submit themselves in the matter to the judgment of the court, declaring themselves ready to obey any order the chancellor may make in the premises. The application is opposed by certain of the stockholders on the ground that an election cannot legally be held, and that, if it can, this court has no power to order it.

The first objection, that an election cannot legally be held, is based on the eighty-third section of the act concerning corporations, by force of which, it is insisted, the stockholders and directors are deprived of all power to hold an election. That section, as it stood before the amendment of 1877, provides that whenever an injunction shall have been granted against any incorporated company, in insolvency, as provided for by that act, and a receiver or receivers, trustee or trustees, shall have been appointed as also provided therein, and such injunction and appointment shall have continued for four months, it shall not be lawful for the stockholders or directors of the corporation, or any other person, to use or exercise the franchises of the corporation, or to transact any business in their name or by color of their charter, except such as may be necessary to collect their property and assets, and to sell the same, and distribute the proceeds among the creditors and stockholders of the corporation; and that for all other purposes the charter, by the injunction, appointment and continuance, shall be forfeited and void, without any further proceedings or judgment. By the supplement of 1877 (P. L. of 1877, p. 74) the section was amended by striking out the provision that for all other purposes the charter shall be forfeited and void, without further proceedings or judgment, and substituting therefor the provision that for all other purposes the chancellor may at any time, by order, in the suit or proceeding, with or without notice to any one, and without any further proceeding or judgment, declare the charter forfeited and void; and it was also enacted that the charter of no corporation shall be forfeited and void, notwithstanding the injunction and appointment of receiver or receivers, trustee or trustees, shall have continued for four months; provided the corporation shall have been theretofore managed and doing business under an order of this court. The Central Railroad Company is within the proviso. It is argued, in opposition to this application, that while the supplement indeed provides that the charter shall not be forfeited and void, notwithstanding the provision of the eighty-third section of the original act, it does not relieve the stockholders and directors from the prohibition of that section which was in force against this company

when the supplement was passed; for the injunction and appointment of a receiver had continued for over four months. And therefore it is insisted that by force of the prohibitory provision of that section they cannot lawfully use or exercise any franchise of the company, except for the purposes therein specified in that connection—which are the conversion and distribution of the property of the company—and that, therefore, they cannot lawfully elect directors.

To consider the objection: The Legislature may waive a broken condition of a compact made with it. Ang. & Ames on Corp. § 777. By the act of 1877 the Legislature has expressly and completely waived the forfeiture in this case. But further, it will be seen that the prohibition of the eighty-third section of the original act is, by its terms, not absolute, but partial only. Under that section, according to its terms, the exercise of the franchises is expressly permitted for the purposes of liquidation. The section expressly provides that the charter shall not be forfeited and void for those purposes; that is, that it shall not be absolutely void, but only so far as certain purposes are concerned. It follows that under the provisions of that section, without regard to the supplement of 1877, the organization may be kept up, and therefore that the election of directors is still lawful. If the stockholders may lawfully exercise the franchises for any purpose, it is obvious that they may lawfully select their agents to that end, and the directors are the agents. There is no warrant for holding that the stockholders can only exercise the franchises through the board that may happen to be in office at the expiration of the four months; for the section makes no such provision, and there is no reason to support any such construction. It might well be that by death, disability or resignation there would be no board at all, and it would then be necessary to elect one, or else the stockholders would be without agents to exercise the franchises, and therefore could not use them at all. It might happen that the existing board had ceased to be stockholders, and they might even have become antagonistic to the company. Justice demands that in the case of an insolvent corporation whose affairs are in the hands of this court for administration, the stockholders shall have the choice of the agents by whom the franchises are to be exercised, so far as this court permits such exercise in their behalf. It is clear that if the corporation exist, though only for certain purposes, the stockholders may lawfully elect directors. The property in the hands of the court in this case is valued at about \$50,000,000. By statute the court is required to operate the road for the benefit of the public. Rev. p. 196, § 106. And, without the statute, the same action would be taken in view of the obvious necessity of thus keeping the trust property in proper condition, and making it as productive as possible. There are many very important respects in which the action

of the board as representatives of the company may prove exceedingly useful to the court in administering the trust; and in many of such matters, the future of the company, after it shall have passed out of the hands of the court, may be most materially affected by the action of the board. It is, therefore, eminently proper that the board should be the representatives of the stockholders, and therefore that a proper opportunity should be afforded to the latter to make selection of their agents. Moreover, should the court deem it advisable to turn over the property to the company, the stockholders must receive it by the hands of the board. Therefore, there must be directors; and in such case, as well as generally, the board should be the true and lawful representatives of the stockholders whose property they are to control and administer. No board has been elected since 1876. I have no doubt whatever that one may be now legally elected, and I am of opinion that such election should be held without any unnecessary delay. Under the circumstances, this court has power over the subject, and it is its duty not only to see to it that an election be held, but that it be so held and conducted as that it shall in all respects be legal. The action of stockholders before referred to in taking steps for an election under the fifty-first section of the act concerning corporations was objectionable, because it was taken without application to this court, which alone, under the circumstances, could take the measures necessary to secure fairness in the election, and obviate all reasonable cause of complaint on the ground of surprise. The circumstances were peculiar. The affairs of the company had for many years been in the hands of this court. There had been no election of directors by the stockholders since the insolvency was declared. The existing board disputed the power of the stockholders to hold the election. The proceeding was under a provision of the law, the applicability of which to an insolvent company, whose affairs were under the management of the court, was denied. It was quite evident that the election, if held under the circumstances, would be subject to imputations of surprise and unfairness, and to questions as to its validity which would lead to litigation or induce this court to refuse to recognize it as a just and proper expression of the choice of the stockholders. Hence, it was not permitted to take place. The situation is now changed. The directors, who then declined to hold the election, now declare their readiness to hold it if this court shall so direct. The charter provides that if the election shall not be held on the day when, pursuant to that act, it ought to be held, it may be held at any other time. As before mentioned, it fixes no time, but the by-laws do. The election was not held on the day fixed. There was not time enough between the making of the order modifying the injunction and the time fixed by the by-laws to give the notice required by the by-laws, and besides, the directors declined to order an election at all

on other grounds. I deem it proper to conform to the by-laws as nearly as practicable in holding the election. There will be an order that the directors hold it, fixing as early a day as practicable; the day to be named in the order. The election will be held and conducted in accordance with the provisions of the by-laws, as nearly as may be. The board will appoint the inspectors, the names of the persons appointed to be reported to this court at least ten days before the time fixed for the election. The transfer-book will be closed twenty days before the time fixed for the election. The receiver will be directed to facilitate the proceedings by permitting the use of the books etc., etc., and in every other way.

THE STATE ex rel. ATTORNEY-GENERAL

v.

JOHN W. MERCHANT et al.

(37 *Ohio Reports*, 251.)

The right of the stockholders of a railway corporation to elect directors is not affected by the sale of the property of the corporation by a receiver, under an order of court.

At a meeting of the stockholders, called for the election of directors, under section 3246 Revised Statutes, the right to choose the inspectors or judges of election is vested in the stockholders, and the directors, against the will of the stockholders present, cannot appoint such inspectors.

QUO WARRANTO.

This is an information in the nature of quo warranto, brought by the attorney-general against John W. Merchant and others, defendants, to oust them from the office of directors of the Columbus, Washington and Cincinnati Railway Company, a corporation organized under the laws of this State.

The petition sets forth the names of Thomas Smith and others, who claim to be entitled to the office of directors of said corporation, and avers their right thereto.

It appears that the defendants were the directors of said corporation, elected at the annual election held on the first Monday of January, 1879. On the first Monday of January, 1880, being the day for the annual election, no election was held; and that afterwards due notice was given in accordance with the statute by certain stockholders of the holding of an election for directors at a time and place specified. A meeting of stockholders was held in accordance with the notice. After organizing, the stockholders present elected inspectors, or judges of the election, and also a

clerk, who were all duly sworn. Whereupon the judges declared the election open and proceeded to receive the votes of stockholders. The election thus held resulted in the election of Smith and others, who are averred in the petition, as above stated, to be entitled to the office of directors of said corporation.

There were present at the meeting a quorum of the directors elected in 1879, who claimed the right to hold the election. Before the inspectors, or judges and clerks, elected as above stated were sworn, John W. Merchant, president of the board of directors, appointed, from the members of the board, judges to hold the election; he also appointed a clerk, and then declared the election open. At this election stockholders voted. The election thus held by the directors resulted in the election of the defendants. Both sets of directors took the oath of office.

It does not appear from the pleadings that any election has since been held.

It also appears that on September 9, 1878, the court of common pleas, on the application of certain bondholders, appointed a receiver, who took possession of the assets of the company, and subsequently, under an order of said court, the railroad of said company, with its equipments and appurtenances, was sold as an entirety.

George. K. Nash, attorney-general, and Nesbitt & Martin, for plaintiff.

Charles Darlington, for defendant.

WHITE, J.—The appointment of the receiver, and the sale of the property of the railway company, have no bearing on the question before us. These facts did not work a dissolution of the corporation, and while the corporation continued it was competent for the stockholders to elect directors.

The only other question for determination is, whether the election held by the directors or that held by the stockholders is the valid one.

The statute on the subject is as follows: "Unless the regulations of the corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday in January of each year; if the trustees or directors are, for any cause, not elected at the annual meeting, or other meeting called for that purpose, they may be chosen at a members' or stockholders' meeting, at which all the members or stockholders are present in person or by proxies, or at a meeting called by the trustees or directors, or any two members or stockholders, notice of which has been given, in writing, to each stockholder, or by publication in some newspaper printed in the county where the corporation is situate, or has its principal office, for ten days; and trustees and directors

shall continue in office until their successors are elected and qualified." Rev. Stat. § 3246.

There were no regulations of the corporation governing the election of directors. The claim of the attorney-general is, that at the meeting of the stockholders for the election of directors, the right of choosing the inspectors or judges of the election was vested in the stockholders; while the defendants claim that the right was vested in the directors. We think the position of the attorney-general is correct; and that the directors, in assuming that function against the will of the stockholders present, mistook their duty and exercised a function not warranted by law. The election, therefore, which they undertook to hold is invalid. The election held under the authority of the stockholders was legal; and the persons declared elected at the election last named, having been duly qualified, were entitled, under the statute, to hold the office until their successors were elected and qualified. The pleadings show no subsequent election.

Judgment of ouster rendered against the defendants; and the persons chosen as directors at the election last mentioned adjudged entitled to the office under such election.

ALFRED F. WILCOX

v.

TOLEDO AND ANN ARBOR R. R. Co.

(43 *Michigan Reports*, 584.)

Pleadings in justices' courts are to be viewed with liberality; and where a declaration, though informal, fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to.

Suit on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was endorsed the name of a person who added to his name the word "assignee." The defendant pleaded the general issue, and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and the endorser of the paper was assignee in bankruptcy thereof. *Held*, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee, would not be sustained on the final submission of the case.

Where the assets of a railroad company are sold in bankruptcy, and the purchaser of its assets transfers them to another who organizes a new company, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old company.

A railroad company having completed a railroad, and being engaged in operating it, must be deemed, in suits brought by it, a corporation *de facto*, and a private individual thus sued cannot contest its legal organization. *Swartwout v. Railroad Co.*, 24 Mich. 389.

ERROR to Washtenaw. Submitted Jan. 7th. Decided June 11th. Assumpsit on certiorari from before a justice. Plaintiff brings error.

Henry Z. Potter, for plaintiff in error.

Frazer & Hamilton for defendant in error. An assignment of a claim to the plaintiff is sufficiently averred in an action before a justice by the indorsement of the assignment on the instrument sued upon, signed by the assignee. *Snell v. Gregory*, 37 Mich. 500; *Kelly v. Waters*, 31 Mich. 404; *Draper v. Fletcher*, 26 Mich. 154.

COOLEY, J.—This case had its origin in justice's court, where the railroad company brought suit upon the following paper writing as its sole cause of action :

"\$300.

MILAN, MICHIGAN, August 21, 1871.

"For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor and Northern R. R., and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay to the order of the Toledo, Ann Arbor and Northern R. R. Co. the sum of three hundred dollars in instalments of twenty per cent on each eight miles of iron laid on the line of said road, except the last instalment, which shall be payable on the ironing of the said road from the State line to Ann Arbor, and upon the further condition that said road shall be built within one half mile of the Whiting Hotel in the village of Milan.

[Signed]

"A. F. WILCOX."

Endorsed on the back, "E. D. KINNE, Assignee."

The judgment was removed to the circuit court by certiorari, the plaintiff in error assigning six errors. The first three of these go to the order in which evidence was admitted in justice's court. As the order was discretionary with the justice, these assignments of error need not be further noticed. The others were as follows :

"4. That said justice erred in admitting any evidence of an assignment or assignments under plaintiff's declaration upon said special contract, which was not transferable except by assignment, since no assignment was suggested or averred in said declaration.

"5. That said justice erred in admitting said contract declared upon in evidence, there appearing upon the face to be no privity of contract between plaintiff and defendant, since defendant was apprised neither by suggestion or averment that plaintiff obtained as assignee, and because there was no averment and no evidence of ownership by plaintiff of said contract.

"6. That said justice erred in denying defendant's motion to nonsuit the plaintiff for the variance between the cause of action set forth in his declaration and his proofs upon the trial."

The declaration was oral, and was entered by the justice on his

docket as follows: "On the common counts in assumpsit, and on note or contract, now here filed as a part of the declaration, and claims damages three hundred dollars." The plaintiff also notified defendant that the paper writing was the sole cause of action. The defence is entered as follows: "The defendant demands trial of the matter set forth in the plaintiff's declaration, and gives notice that he will show, under his plea of the general issue, a failure of consideration in this, to wit: That the said contract declared on, if performed at all, on the part of the promisee, was not performed within a reasonable time, by reason of which the defendant received no benefit on its performance, in this, to wit: At the date of said contract defendant was owner of and possessed of lands of great value, to wit, of the value of five thousand dollars, which said lands it was contemplated by said contract would, by its performance within a reasonable time, be benefited and rendered of greater value to defendant, to wit, by the performance of the promises on the part of said promisee. And by reason of the delay in the performance on the part of the said promisee said lands were not increased in value, and said defendant was not benefited." There was no denial under oath, by the defendant, of the execution of the paper writing, and therefore under the law it was admitted.

On the trial, the plaintiff proved by one Crane that the Toledo, Ann Arbor and Northern R. R. Co. was thrown into bankruptcy on his petition August 13th, 1875; that E. D. Kinne was appointed assignee thereof, and as such sold the assets of the company, including the paper sued upon, and that witness became the purchaser of said assets, including the writing sued upon, and that Kinne endorsed his name as assignee upon such writing. Plaintiff also proved a deed from said Kinne, as assignee in bankruptcy of said railroad company, to said Crane of the real estate, property and franchises of said company, including among other things about \$40,000 in promises to pay money, conditioned upon the laying of the iron of the road-bed, which deed bore date October 6th, 1875. Also a deed from said Crane to James M. Ashley, of the same real estate, property and franchises, bearing date June 26th, 1877. The foregoing evidence was objected to for irrelevancy, and also because Kinne's title as assignee was not proved. This last objection was obviated afterwards by record evidence.

Plaintiff also put in evidence an authenticated copy of the declaration of incorporation of the Toledo and Ann Arbor Railroad Company, filed in the office of the Secretary of State November 23d, 1877, and proved by James M. Ashley, Jr., that this company had fully completed and ironed the road from Toledo to Ann Arbor, and was operating it. Also by another witness that the completed road runs within a hundred rods of the Whiting Hotel in Milan. Also that demand of payment had been made of defendant, which he

had refused to make. The writing was then put in evidence, and plaintiff rested. Defendant then moved for a non-suit on the following grounds :

"1. That the declaration does not allege any assignment of the instrument declared on, and the evidence shows its right to recover as assignee only, if it shows right to recover at all.

"2. That plaintiff's declaration does not aver an assignment from the Toledo, Ann Arbor and Northern Railroad Company, to the plaintiff, or to its assignor, and the evidence establishes its right to recover only under such assignment or assignments."

The third was substantially the same as the second. The justice denied the motion, and defendant offering no evidence the plaintiff had judgment.

Other objections were made in this court, but these were all to which the attention of the circuit court was called, and we can consider no others.

The fourth and sixth assignments of error cover the same ground as the defendant's motion for a non-suit before the justice, and they go no further. Their complaint is that the plaintiff was allowed to recover as assignee, without having alleged an assignment in his declaration. The complaint is therefore to the form of the plaintiff's pleading.

It is no new thing to have an objection of this sort to the pleadings in justices' courts raised before us. As the proceedings in those courts are commonly managed by parties unlearned in the law, defects in their allegations, when tested by the rules of art, are to be expected in almost every case which is at all complicated. If every such objection were disregarded, pleadings in justice's courts would, in effect, be dispensed with. Every plaintiff might allege as much or as little as he pleased, and recover without regard to his allegations. If every one were sustained which would be good if made to pleadings in courts of record, the parties in justices' courts would be driven to the employment of legal assistance in every case, and these courts, which are intended for the easy and inexpensive redress of wrongs not of great magnitude, would cease to accomplish their purpose. This court has adopted neither the one course nor the other. It has required the plaintiff in justices' court to apprise the defendant fairly of the cause of action relied upon, but when this has been done, the court has refused to regard formalities or technicalities. The object of the declaration is fully accomplished when the defendant is fairly apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial. *Hurtford v. Holmes*, 3 Mich. 460 ; *Daniels v. Clegg*, 28 Mich. 32.

Does the declaration in this case accomplish this purpose? It certainly informs the defendant what he is sued upon. The contract is recited, and defendant is notified that claim is made against

him upon it, and upon nothing else. The contract itself specifies the conditions of liability, so that defendant knows there can be no recovery unless performance of these is proved. It is said the declaration does not count upon an assignment. But it counts upon a promise made to another, and upon which there could be no recovery except upon the proof of an assignment. The very claim to recover upon the paper was a claim as assignee, for it was only as assignee that plaintiff could have a right to it. Moreover, the paper was made payable to the railroad company or order, and there was an indorsement upon it by E. D. Kinne, as assignee, which fairly notified the defendant that Mr. Kinne claimed to have become entitled in some manner to order the payment to be made to a transferee. It is true this indorsement might have been more formally made; it might and ought to have assumed the form of an assignment, with such recitals as would have shown Mr. Kinne's authority; but the question now is whether the defendant was thrown off his guard or misled by any defects, and not whether the pleadings might have been made more perfect. We must judge of this upon all the facts, and not upon the face of the papers alone.

What the defendant ought to do in every case in which the declaration is supposed to be fatally defective, is to demur, and thereby bring the defect at once to the attention of the court, before parties have been put to trouble and expense in preparing for trial. No doubt he has a legal right to abstain from doing this, when the defects, in substance, are such as cannot by any intendment be supplied or overlooked, but this course is not conducive to justice, and courts will not countenance it any farther than they may feel compelled to do so. When the defendant fails to demur, he tacitly concedes the sufficiency of the declaration, and the court will hold him to this concession, whenever this can be done without probable injustice.

There was no demurrer in this case. When the evidence was put in, it appeared that Mr. Kinne was assignee in bankruptcy of the railroad company, and as such had a right to assign the paper writing. Now a fact so notorious as must be the bankruptcy of a railroad company, we are not at liberty to suppose was unknown to one of its debtors. It is the most reasonable inference in the world that defendant was familiar with the facts, and that it was because he knew them that he refrained from demanding more perfect pleadings. It is the duty of the court to draw this inference, and to act upon it under the circumstances.

The fifth assignment of error is somewhat broader than the others. It complains of the admission of the paper writing in evidence, "there appearing upon the face to be no privity of contract between the plaintiff and defendant, since defendant was apprised, neither by suggestion or an averment, that plaintiff obtained as assignee, and because there was no averment and no evidence of

ownership by plaintiff of said contract." Here is the same objection to the declaration, but there is also the further objection that plaintiff had not shown its ownership by evidence.

It has already been stated that there was a formal assignment by deed from Kinne as assignee to Crane, and from Crane to Ashley. The evidence of the assignment from Ashley to the plaintiff is to be found in the certificate of organization of the plaintiff as a corporation, which is signed by Ashley, and expressly declares that all the assets of the bankrupt corporation, so as aforesaid assigned to him, including the \$40,000 conditional promises, "are declared to be and hereby become" the property of the new company. It can scarcely be pretended that Ashley, after this, could claim them.

But it is objected in this court that the plaintiff was never lawfully and legally organized. It was certainly organized, went on and completed the road, was operating it at the time the suit was tried, and still is operating it, so far as we know. If there was any usurpation of franchises here, the State should be left to complain of it. *Swartwout v. Michigan, etc., R. R. Co.*, 24 Mich. 389. There was no pretence in the court below that plaintiff, as successor of the original company, had not complied with the conditions of the promise.

In our opinion the plaintiff in error has failed to point out any error in the rulings of the justice of the peace, and therefore the affirmance of the justice's judgment by the circuit court must be affirmed with costs.

MARSTON, C. J., and GRAVES, J., concurred.

CAMPBELL, J. (dissenting).—This case depends, so far as its merits go, on a very simple state of facts. While I am not clear that there are not fatal defects of proof, yet I do not think it necessary to consider them.

In 1871 a corporation was in existence under the name of the Toledo, Ann Arbor and Northern Railroad Company. Plaintiff in error and several other persons signed papers which were severally obligatory, and in the following form: "For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor and Northern Railroad, and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay to the order of the Toledo, Ann Arbor and Northern Railroad Company the sum of \$300, in instalments of 20 per cent on each eight miles of iron laid on the line of said road, except the last instalment, which shall be payable on the ironing of the said road from State line to Ann Arbor, and upon the further condition that said road shall be built within one half mile of the Whiting Hotel in the village of Milan." This was dated August 21st, 1871. The corporation did considerable grading and other work, but finished no part of the railroad in Michigan, and laid no iron. In the early part of 1874 it was

prosecuted in bankruptcy in the eastern district of Michigan, and in June, 1874, E. D. Kinne became assignee in bankruptcy. There is no adequate proof of these proceedings, but enough appears to show the steps taken by the assignee.

In August, 1875, Kinne advertised for sale a list of assets which was made up as follows: (1) Of stock subscriptions, and agreements to take stock, and of promissory notes and judgments for stock subscriptions. (2) Of the road-bed and right of way. (3) Certain wood and ties. (4) Certain promissory notes conditioned on placing the iron. (7) Certain land.

In September, 1875, Kinne sold the property set forth in this inventory or list to Benjamin P. Crane. The sale, as Mr. Kinne shows, and so it appears from the papers, covered only this list. The list undoubtedly contained enough to reach the paper now in suit.

Mr. Crane in 1877 transferred his purchase to James M. Ashley. On the twenty-third of November, 1877, Mr. Ashley made and filed with the Secretary of State a certificate as purchaser, undertaking to organize a new corporation, which is the plaintiff in this case, purporting to be made under Act No. 198 of 1873, article 1, section 2, and asserting the intention of exercising the functions of the older corporation.

The plaintiff corporation built a railroad from the State line to Ann Arbor, which, if built by the old company seasonably, would have fulfilled the condition of the paper sued on.

The question therefore is whether the plaintiff, without any dealings with defendant, could assume the place of the old corporation, and by building this road compel Wilcox to pay his subscription, when nothing had occurred before the bankruptcy to earn any portion of it.

I do not see how the fact that this is a railroad agreement puts it on any different footing from any other conditional agreement. Any money actually earned by the old corporation could be assigned. But I do not think there is any rule of law which will authorize a party who has had an offer made to him of payment of a certain premium if he performs a certain condition, to substitute some one else in his stead, not as agent, but as a new principal. No authority was produced for any such doctrine, and I do not believe such a principle is tenable. No doubt it is competent in some cases to merge an old corporation in a new one, and we have had several charters as well as general laws, under which the corporate identity has been kept up in a new name, and with larger as well as smaller powers. But there can be no shifting of corporate identity except by statute, and I am not able to find any such statutory change here. I think the case fails on any such claim. If there is no corporate identity the failure of the old company and its bankruptcy before any money was earned put an end to the relations of the

parties. Such a liability could not be kept up indefinitely. Interests might and probably did change when there was no assurance that the plaintiff in error's property could be benefited. The original road could claim no rights after seven years from its organization. Comp. L. § 47.

It is plain that the bankrupt law favored no such doctrine. There is nothing in that act which attempts to transfer to the assignee in bankruptcy any of the corporate franchises. The power to exercise corporation franchises in a State, derived from the corporate charter, is preserved expressly so as to prevent dissolution. The law, while it provided for disposing of corporate assets, distinctly declares that no discharge shall be granted to any corporation. The bankrupt company must continue to exist as a corporation, and still exists for all purposes north of Ann Arbor.

There has never been any difficulty in obtaining corporate powers to make use of or finish a purchased road, as well as to build a new one. By Act No. 190 of the laws of 1873, which is set up in the brief of counsel for the railroad as covering this case, a railroad company is allowed, under certain restrictions and conditions, to sell all or part of its road to another existing incorporated company. That statute, however, does not reach sales in bankruptcy, but requires confirmatory action by the stockholders. It requires the sale to be to an existing company, which thereby becomes liable to duties. And it does not merge the selling in the buying company. 1 Sess. L. 1873, page 478.

Act 198 of 1873, which is the general revisory act concerning railways, is the one under which the new company was actually organized. It was done under section 2 of article 1. That section, however, applies by its terms, as the previous analogous statute of 1859 did (Laws 1859, p. 252), only to sales under mortgages and trust deeds, and allows purchasers of all and any specific part of a railroad to organize for the purpose of its management with the same powers as to such purchased property as were possessed by the mortgaging company. This statute does not purport to reach sales on execution or in bankruptcy, and it does not refer to purchases of anything but a road or a part of one. It has no reference to general assets or personality, and it does not purport to extinguish the old company or to merge it wholly or partially. The new company is not bound to any of the liabilities of the old one, or substituted in its place.

The statute makes no provision for incorporating by the purchaser's certificate, except as to the purchase of the road itself; and if the new corporation obtains any other assets, it is only on the footing of any other assignee, and with no greater or different interest from that which might be retained by a private purchaser without any attempt to incorporate.

I think the judgment against Wilcox should be reversed.

JAMES GREENWOOD
v.
THE UNION FREIGHT R. R. Co.

(*Advance Case, U. S. Supreme Court. March 18, 1882.*)

Where the legislature of a state has repealed the charter of a street railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity, who asks an injunction on the ground that the repealing statute impairs the obligation of a contract.

Such a statute does impair the obligation of the contract of the charter, unless there is reserved to the legislature the right to repeal the statute under which the company was organized.

In the State of Massachusetts such a reservation becomes part of every act of incorporation, by virtue of the following language in section 41, chapter 68, of the General Statutes, to wit: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature." The court here gives a history of the origin of this and similar clauses of reservation in the statutes of the states.

The effect of the repeal of an act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into, and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights.

The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power.

If the repeal of the old corporation was within the power of the Massachusetts Legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and, so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor.

A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States if it provides for compensation for the property of the extinct corporation so taken by the new one.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

George F. Edmunds and A. B. Wentworth, for appellant.
W. G. Russell and D. E. Ware, for appellee.

MILLER, J.—The appellant, Greenwood, a citizen of the State of New York, brings his bill of complaint, in the Circuit Court for the District of Massachusetts, against the Union Freight R. R. Co.,

a corporation established by the laws of Massachusetts; against the Marginal Freight R. R. Co., likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name, and against the directors of the Marginal Freight R. R. Co., all citizens of Massachusetts.

The Union Freight R. R. Co. demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight R. R. Co., which we shall hereafter call the Marginal Co., was organized under an act of the Legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight R. R. Co., and the Marginal Co., by virtue of a provision in its charter, purchased and paid the Commercial Co. for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the Legislature of Massachusetts incorporated, by an act of that date, the Union Freight R. R. Co., which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Co., and to take possession of the track of that and any other street railroad company on payment of compensation. This latter act also repealed the charter of the Marginal Co.

Sections four, six, and seven of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Co., and, as they are short, they are here given verbatim:

"Sec. 4. Said corporation may, within its authorized limits, and for the purpose of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

"Sec. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Ry. Co., subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

"SEC. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an 'Act to incorporate the Marginal Freight Ry. Co.' and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Ry. Co., are hereby repealed."

The bill avers that the Union Freight R. R. Co. has been organized, and is about to proceed in such a manner under this act that the Marginal Co. will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Co. to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the state courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants to prevent these acts so injurious to the rights of the Marginal Freight R. R. Co.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain the bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes v. The Contra Costa Water-works Company*, in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is whether the features of that act to which complainant objects in his bill are beyond the power of the Legislature of Massachusetts,

or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two :

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the state, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in section 41 of chapter 68 of the General Statutes of Massachusetts in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended, that is, it may be changed, by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the Legislature," is sig-

nificant, and is not found in many of the similar statutes in other states.

This statute having been the settled law of Massachusetts and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the Legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock*, 23 Pickens, 334; *Erie & N. E. R. R. Co. v. Casey*, 26 Penn. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent's Comm. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the Legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the Legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists; its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. R. 146, the Supreme Court of that state made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligations of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck* and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the

functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. R. 146.

It would seem that the states were not slow to avail themselves of this suggestion; for while we have not time to examine their legislation for the result, we have, in one of the cases cited to us as to the effect of a repeal, a case from 1 Paige's Chancery Reports, 102, in which the Legislature of New Jersey, when chartering a bank with a capital of \$400,000, in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend and repeal the same. And Kent (2 Commentaries, 307), speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature, of the date of February 25, 1822. How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire; for in 1831 it enacted as a law of general application that all charters of corporation thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Co. v. Maine*, 96 U. S. R. 499; *Sinking Fund Cases*, 99 U. S. R. 700;

Railroad Co. v. Georgia, 98 U. S. R. 358; McLaren v. Pennington, 1 Paige Ch. 102; Erie & N. E. R. R. v. Casey, 26 Penn. St. 287; Miner's Bank v. United States, 1 Greene (Iowa), 553; 2 Kent's Comm. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets or any of the streets of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfill the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfill a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Section 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co. v. Dix*, 6 How. 507; *Central Bridge Corporation v. Lowell*, 4 Gray, 482; *Boston Water-Power Co. v. B. & W. R. R. Co.*, 23 Pickering, 360; *Richmond Railroad Co. v. The Louisa R. R. Co.*, 13 How. 83.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the

Union Freight Company, within four months from the passage of the act, shall take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for \$15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the general laws of the state. The latter clause declares all acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill; and it is so ordered.

Affirmed.

THE PITTSBURG, CINCINNATI AND ST. LOUIS R. R. Co.

v.

THE CENTRAL OHIO R. R. Co., AS REORGANIZED, THE BALTIMORE
AND OHIO R. R. Co., et al.

(*Advance Case, Ohio. Feb. 6, 1888.*)

A railroad corporation, having purchased from another railroad company an undivided interest in the latter's railroad, under the act of April 7, 1868, in relation to insolvent railroad companies, etc., which authorizes such sale under certain conditions, if the same can be made without impairing the usefulness of the road to the vendor company, whereby a tenancy in common was created between the parties, cannot compel partition of the common property either under the statute in relation to partition or in equity.

APPEAL. Reserved in the District Court of Franklin County.

This is an action for the partition of a line (or a section of a line) of railroad, and several parcels of other real estate adjacent to and used in operating the railroad, situate between the cities of Columbus and Newark, Ohio, a distance of thirty-four miles.

The case is submitted upon the pleadings and an agreed statement of facts.

It appears that in the year 1855 the Central Ohio Railroad Company completed and put in operation a line of single track railroad from Bellaire, on the Ohio River, via Newark to Columbus, Ohio, as under its charter it was duly authorized to do. The portion of that line between Newark and Columbus is the subject-matter of this proceeding.

In 1848 the Steubenville and Indiana Railroad Company was chartered for the purpose of constructing and operating a line of railroad from Steubenville, on the Ohio River, via Newark to Columbus, and prior to the year 1858 had completed and put in operation, under its charter, a line of railroad from Steubenville to Newark, about which time an arrangement was made between the Steubenville and Indiana Railroad Company and the Central Ohio Railroad Company, whereby the former company was permitted to run its trains over the latter's road between Newark and Columbus. This arrangement was continued until the thirty-first of August, 1864, when an undivided half interest in the line of road from Newark to Columbus was conveyed by deed from the Central Ohio Company to the Steubenville and Indiana Company as hereafter stated in the opinion of the court.

On the first of November, 1865, the Central Ohio Railroad Company, being insolvent, was reorganized under the statutes of this state, whereby a new corporation was created by the name of "The Central Ohio Railroad Company as reorganized" (one of defend-

ants), which succeeded to all the property rights and franchises of the Central Ohio Railroad Company. And afterwards, to wit, on the first of December, 1866, the Central Ohio Railroad Company as reorganized leased its railroad, under the statute in such case made and provided, to the Baltimore and Ohio Railroad Company for a period of twenty years, renewable for periods of twenty years indefinitely, whereby the Baltimore and Ohio Railroad Company became possessed, and has ever since continued to possess, all the rights of property of the said Central Ohio Railroad Company as reorganized in said line of railroad between the cities of Bellaire and Columbus.

In the year 1868 the Steubenville and Indiana Railroad Company entered into an agreement with the Holliday Cove Railroad Company, of the State of West Virginia, and the Pan-Handle Railway Company, of the State of Pennsylvania, for the consolidation of said companies under the name of the Pittsburg, Cincinnati and St. Louis Railway Company (plaintiff), and it is assumed for the purposes of this case, that under said agreement and proceedings for consolidation the plaintiff became a duly incorporated company, and succeeded to all the property rights and franchises of said Steubenville and Indiana Railroad Company.

Since the organization of the plaintiff, the subject-matter of this action has been in the joint possession and use of the plaintiff and the Baltimore and Ohio Railroad Company, as lessee of the Central Ohio Railroad Company as reorganized.

The following is the agreed statement of facts :

The parties attach hereto a copy of the deed made by the Central Ohio Railroad Company and H. J. Jewett, Receiver, to the Steubenville and Indiana Railroad Company, dated August 31, 1864, and marked Exhibit "A."

Also a copy of the articles of consolidation, under which the plaintiff was organized, and claims to succeed to the property of the Steubenville and Indiana Railroad Company, and marked Exhibit "B."

And also a copy of the mortgage from the Central Ohio Railroad Company to John W. Garrett and others, trustees, marked Exhibit "C."

All of said copies are to be used in this case, the same as the originals thereof if offered in testimony.

The said parties also agree that disputes and difficulties have arisen in the joint management of the property referred to in the pleadings herein, but which are the subject-matters of a suit now pending in the district court of this county, wherein the Baltimore and Ohio Railroad Company is plaintiff, and the Pittsburg, Cincinnati and St. Louis Railroad Company and others are defendants, and of a suit pending in the Circuit Court of the United States for the Southern District of Ohio, eastern division, wherein the P., C.

& St. L. Ry. is plaintiff, and the B. & O. R. R. Co. is defendant. The original file papers and record in said cases are here referred to, and may be used on the hearing of this case, so far as necessary and competent.

It is agreed that this case be submitted on the pleadings, record and journal entries, and the foregoing exhibits and agreed statement of facts. And it is further agreed that the said railroad between Newark and Columbus, Ohio, sought to be divided herein, is in the main a single track railroad between said points.

C. N. OLDS, *of Counsel for Plff.*

J. H. COLLINS, *Counsel for Def'ts.*

Sept. 20, 1882.

MOLLVAINE, J.—In the pleadings are found many charges and counter-charges of bad faith and violations of duty in regard to the joint management and use of this railroad, such, no doubt, as would authorize a court of equity to interfere between the parties and control their conduct, to the end that the property might be preserved, the rights of the respective owners enforced and the public welfare secured; but as these charges and counter-charges are all denied, and no proof offered in respect thereto, and especially as it is agreed that the disputes and difficulties which have arisen in the joint management of the property have become the subject of litigation between the parties in other courts, we have considered this case solely with reference to the right of the plaintiff as a co-tenant to demand partition of the common property; which, indeed, is the prime object in prosecuting the action.

The railroad sought to be aperted, as agreed, "is in the main a single track railroad," and was, originally, the sole property of the Central Ohio Railroad Company. But on the thirty-first of August, 1864, an undivided half interest in the property was conveyed to the Stenbenville and Indiana Railroad Company, under authority of an act of the General Assembly of the State of Ohio entitled, "An Act to provide for the adjustment of affairs of insolvent railroad companies and for their reorganization without a sale of the property thereof," passed April 7, 1863. This statute provides that in case judicial proceedings are or may be pending in any of the courts sitting, or which may sit, in said State, for the sale of any railroad, and the same is in the hands of a receiver or receivers appointed by such court; and in case the railroad involved in such judicial proceedings may be used in whole or in part by said company in common with any other railroad company on the same track between the points on the line common to both, and within the limits of termini established by the charters of both companies, it shall be lawful for the company owning the said railroad, if the same can be done without impairing the usefulness thereof to the company owning the same, to lease for a period of

years, for an annual rentage, or to sell for a fixed sum to the said railroad company to which the said line of road in whole or in part is common, an undivided interest in the same upon such terms and conditions as may be agreed upon ; such lease or sale to be reported to and approved by said court.

The parties and the property being within the conditions of the statute, a sale of an undivided half interest in the line of road between Newark and Columbus was made, and approved by the court having jurisdiction in the matter, and upon its order a deed of conveyance was executed to the Steubenville and Indiana Railroad Company, thus creating an estate in common between the parties to the transaction, to which common estate the parties to this suit have succeeded under authority of statutory provisions. The common estate thus created, however, is held by the owners for the sole use of maintaining and operating a railroad, as a public highway, without any power in either or both the owners to sell the same or any part thereof.

Of this estate the plaintiff demands partition, and to that end invokes the power of the court under the statute, if the case falls within the statute, and if not, then by virtue of its equitable jurisdiction in partition.

The partition statute provides, "Tenants in common and coparceners, of any estate in lands, tenements or hereditaments within the State, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed," section 5754 Revised Statutes. It is also provided that if the court in which an action for partition is pending, shall find that the plaintiff has a *legal* right to any part of the estate, it shall order partition thereof and appoint three disinterested and judicious freeholders of the vicinity to be commissioners to make the partition, section 5757 Revised Statutes. And it is further provided that if the commissioners be of opinion that the estate cannot be divided without manifest injury to the value thereof, they shall return that fact to the court, with a just valuation of the estate, section 5762. And further, that if no election be made by any of the parties to take the estate at its appraised value, then the court, at the instance of a party, may order the sale of the estate at public auction, section 5764.

Independent of the statute, the right of a co-tenant to have partition does not depend upon the fact that a division of the property will not injuriously affect the value thereof ; but, under the statute, actual partition cannot be made where it appears, in the opinion of the commissioners, that manifest injury would result from such division.

It is claimed on the part of defendants, that under this rule, the property in controversy could not be aparted between the owners. But, conceding this to be so, it is claimed on the other hand, that a case then arises under the statute for the sale of the property.

While it must be admitted that the power of sale extends to all cases in partition under the statute, wherein actual division of the estate would manifestly injure the value thereof; it must also be admitted, that the existence of the power to sell in such cases, does not enlarge the right of partition given by the statute to cases which would not be within it, if the power to sell did not exist. Hence, the question arises, is the partition of such railroad within the purview of the statute? In the solution of this question, the effects and consequences of a sale may be considered. The general policy of the State has been to withhold from railroad companies the power to sell their roads. True, a general power to mortgage has been given, and as a consequence, a sale on foreclosure may be made. Such consequence must have been contemplated by the legislature; but it does not follow that a partition or sale on proceedings in partition of a railroad was contemplated when authority was given to create a tenancy in common in such property. On the other hand, as it has been the policy of the State to perpetuate the ownership in severalty of a railroad without power of alienation, it is more reasonable that, when a tenancy in common in such property was permitted, the intention was a perpetual ownership in common, especially as the power of alienation was withheld from the tenants in common.

Again, as the chief value of such property consists in its use as a public highway, and as it is the interest of the public that each tenant in common should maintain its highway from terminus to terminus, as well over the common right of way as beyond it, we cannot believe that the legislature contemplated or intended, by permitting such joint ownership and use, to provide thereby a means for the destruction of both or either of the roads, in whole or in part, owned and operated by the parties, by a partition or a sale in partition proceedings, under the statute regulating partitions, passed many years before this species of property had an existence.

Surely this is no ordinary estate in common or coparcenary either as to the subject-matter or manner of holding.

But it is claimed that, independent of the statute, the plaintiff is entitled to have partition in equity, where, as at common law, the right to demand actual division is acknowledged to be absolute and inseparable from an estate in common, coparcenary or joint tenancy, without regard to the fact whether the division of the estate will prove advantageous or ruinous to the co-tenants. The question, however, is still open to inquiry, whether the estate in controversy is within that rule.

It must be recollected, as above stated, that the case as presented to us, involves no equitable consideration, other than the mere right of co-tenants to have partition of the common property so that each may hold his own interest in severalty.

The difficulty in the case mainly arises from the fact that the

public has an interest in the use to which the property is perpetually devoted, and no one will deny that equity will recognize and protect the public interest, and to that end will consider the state of legislation on the subject.

We concede that a railroad company is a private corporation invested with private rights; among which is the right to own and operate its railroad. Nevertheless, its duty is to manage and operate its road in the transportation of passengers and freight for the use and benefit of the general public. To enable it to perform that duty, it is invested with the power of eminent domain, whereby private property may be taken and devoted to the public use. It is also authorized to purchase property necessary and convenient for the construction and maintenance of the highway; and property thus obtained is as much devoted to public use as that condemned in the exercise of the power of eminent domain. All its powers and duties are prescribed by statutory law. As well its power to dispose of, as to acquire property. Neither of the parties to this suit have power to sell and convey, for any purpose, its interest in the subject-matter of the suit. They have no power to make partition between themselves, for this would involve the power to make mutual releases and conveyances. Hence, we come to this question, Will equity compel partition between co-tenants, sui juris, who have no power to partition their common property amicably? Partition is completed in equity by mutual releases. Will equity decree mutual releases between the parties, where, by law, the power to execute them is withheld from the parties? We can find no precedent of the kind. In partition between infants, the execution of releases is postponed by the decree, until the majority of the co-tenants. In Freeman on Co-tenancy and Partition, it is said: "But courts of equity never professed to act directly on the title. Their decrees operated in personam only. A decree of partition did not purport to invest the parties with titles to their several allotments. The final action of a court of equity in reference to a partition was based upon the hypothesis that it was just and equitable that a certain allotment should be made between the parties. The court therefore directed that the parties should do that which it had determined they ought to do; in other words, that they should make partition between one another by executing mutual conveyances. Without such conveyances, the legal title to the property remained unaffected. A partition in chancery, like a voluntary partition made by the parties, must be consummated by mutual conveyances. Therefore, no effectual partition can be had in equity against any person not competent to execute a conveyance." Section 427.

Assuming that in States where power to sell is given in cases of statutory partition if actual partition would injure the property, a court of equity in like cases would follow the analogy of the stat-

ute, and modify the form of its remedy, still the subject-matter of its jurisdiction would not be enlarged; and we understand it to be a fundamental principle in the doctrine of partition, that partition cannot be demanded as a matter of right, either under the statute or in equity, if the co-tenants are excluded from the power to make voluntary partition of the subject-matter, from considerations of public policy or by positive law.

This brings us to consider the force and effect of the statute of April 7, 1863, under the authority of which the tenancy in common now sought to be severed was established. This statute when construed in the light of other legislation in *pari materia*, we think excludes the parties before us from the power of making voluntary partition between themselves by mutual releases, and consequently from the right to compel partition under the statute or in equity.

The section of road now sought to be partitioned, at the date of the passage of this act was owned and operated by the Central Ohio Railroad Company as a part of its line of road extending from Bellaire to Columbus, via Newark. At the same time the Steubenville and Indiana Railroad Company owned and operated a road from Steubenville to Newark, with power under its charter to extend its line of road to Columbus. The statute authorized the sale of an undivided interest in the road between Newark and Columbus by the Central Ohio Company to the Steubenville and Indiana Company, "if the same could be done without impairing the usefulness thereof," to the Central Ohio Company. This condition was unquestionably inserted in the statute upon considerations of public policy. In the deed of conveyance it was recited that the sale did not impair the usefulness of the section to the vendor company. It was not meant either by the statute or the deed that the exclusive use of the section was preserved to the Central Company, but that in the joint use of the section reasonable facilities were and would be afforded the Central Company for conducting its business over this line of road—in other words, that one half of the capacity of the road was sufficient to supply the necessities of the vendor company. We do not understand that any implication arises that the Central Company should be entitled to the use of the road to the full extent of the requirements of its traffic, however great its volume might become, but we do understand it to be implied that the one half of the capacity of the road was and should be subservient to the uses of the vendor; and that the vendee acquired no right, in any way, to deprive the vendor thereof. It was the use of an undivided road, not the half of the road when divided, that was thus secured to the vendor, and this not for a time limited at the pleasure of the purchaser, but for all time. This is inferable from the fact that no further power to alienate existed in either party, save such only as might result from the power to create debts.

Our conclusion, therefore, is that the provisions of this statute,

when considered in connection with the fact that power of alienation was withheld from these co-tenants, is inconsistent with the absolute right to demand or compel partition, whereby the usefulness of a part of this section of the road to the successor of the Central Ohio Railroad Company would undeniably be impaired. The legislature did not contemplate or intend that a partition of this property should be made; but, on the other hand, did intend a perpetual joint use of the highway.

Petition dismissed.

THE ATCHISON, TOPEKA AND SANTA FE R. R. CO.

v.

THE PEOPLE EX REL. ATT'Y-GENERAL.

(5 *Colorado Reports*, 6.)

It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies.

An action for the usurpation of an office or franchise is a civil action under the Code of this State, and must be governed by the rules applicable thereto; must be instituted by filing a complaint and issuing a summons, and proceeded with the same as any other action.

Section 1108 of the General Laws limits the duties of the Attorney-General to State cases instituted or pending in the Supreme Court of the State. His duty to appear in State cases in inferior courts, would be obligatory only when required to do so by the Governor or General Assembly.

It is the duty of the district attorneys to appear in the district courts of their respective districts on behalf of the State. (Gen. Laws, section 895; Code, section 260.)

Where, by statute, authority is given to a particular officer, its exercise by any other officer is forbidden by implication.

ERROR to District Court of El Paso County.

Mr. G. B. Reed, Mr. Willard Teller, and Mr. Charles E. Gast, for plaintiffs in error.

Attorney-General, Charles W. Wright, for defendants in error.

ELBERT, J.—This is a proceeding by information in the nature of a quo warranto upon the relation of the Attorney-General in behalf of the State against the Atchison, Topeka and Santa Fe Railroad, for the alleged usurpation of a corporate franchise.

Some of the questions made are disposed of by the decision in the case of the Central and Georgetown Road Company v. The People, decided at the April term. It was there held (1) that whatever the form of the action prescribed by the General Assembly to

remedy the usurpation or misuse of a corporate franchise or public office, whether by information in the nature of a quo warranto, or by the ancient writ of quo warranto, or by a complaint under the Code in a civil action, the objects to be obtained are identical, and the proceeding is in substance civil, instituted for the determination of purely civil rights; (2) that chapter 25 of the Code, concerning "actions for the usurpation of an office or franchise," is free from any constitutional objections arising from section 20, article 5, of the constitution; (3) that under the Code the proceeding to remedy the usurpation or misuse of a franchise, is by civil complaint and summons.

It is insisted, however, that notwithstanding the provisions of chapter 25 concerning actions for the usurpation of an office or franchise, the proceeding by information, in the nature of quo warranto, still remains, and may be pursued, as at common law.

That this position is without foundation, we think clear. A leading term of all Code reform is the abolition of common law forms of actions, and the establishment of a single, simple and universal remedial procedure called a "civil action," by which rights shall be maintained and duties enforced. The Code commences with the declaration "that the distinctions between actions at law and suits in equity, and the distinct forms of actions and suits heretofore existing, are abolished, and there shall be in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act."

Section 48 declares "that the mode of pleadings in civil actions and the rules by which the sufficiency of the pleadings shall be determined shall be as prescribed in this act and not otherwise."

These provisions leave no doubt of the mandatory character of the procedure prescribed by the Code in lieu of the ordinary common law forms of actions, such as assumpsit, debt, covenant, ejectment, etc., etc.

The Legislature having, in chapter 25 of the Code, provided for "actions for the usurpation of an office or franchise," and having repealed by the same act chapter 73 of the Revised Statutes, authorizing proceedings by information in the nature of quo warranto, a clear intent is manifested not to give a cumulative remedy, but to replace the common law proceeding by that prescribed by the Code. The repeal implies a negation.

It is a general rule that where a statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. 2 Potter on Corp. Sec. 665; *Palmer v. Foley*, 36, Superior Court Rep. (N. Y.) 14. An action for the usurpation of an office or franchise, therefore, is a civil action under the Code of

this State, and must be governed by the rules applicable thereto; must be instituted by filing a complaint and issuing a summons, and proceeded with the same as any other civil action.

When common law forms contain the allegation necessary to support any particular cause of action, they may be used, provided they comply with the provisions of the Code, and state the facts constituting the cause of action in ordinary and concise language. The information in this case is in the form heretofore usually adopted when the proceeding was by information in the nature of quo warranto, and is but the statement of legal conclusions according to an ancient form. Of such an information in the case of *The Central and Georgetown Road Company v. The People*, cited *supra*, the court says: "Doubtless the mere statement of legal conclusions, with the demand that defendant show by what authority it exercises a franchise such as was anciently tolerated, when the proceeding was by information in the nature of quo warranto, would not be sufficient under the Code. The writ is also the ancient citation, to show by what authority, etc., and can in no wise be regarded as the equivalent of the summons required by the Code. It does not state the county in which the complaint is filed, or that it is filed at all; nor does it sufficiently state the cause and general nature of the action, as is contemplated by the Code."

These objections were taken by the motion to quash the writ, and should have been sustained.

Another objection taken by the motion to quash was that the Attorney-General of the State had no power to institute the proceeding.

The duties of the Attorney-General are prescribed by the General Statutes, sections 1103 to 1108 inclusive. Section 1103 provides: "The Attorney-General shall attend in person at the seat of government during the session of the General Assembly and the Supreme Court, and shall appear for the State, prosecute and defend all actions and proceedings, civil and criminal, in which the State shall be a party or interested, when required to do so by the Governor or General Assembly, and shall prosecute and defend for the State all causes in the Supreme Court in which the State is a party or interested."

This section limits the duties of the Attorney-General to State cases instituted or pending in the Supreme Court of the State, unless it can be said the second clause of the section is intended to include State cases pending in inferior courts.

But if this construction be given it, the duty of the Attorney-General to appear in State cases pending in inferior courts would still be obligatory only when required to do so by the Governor or General Assembly. There is no claim that the Attorney-General in this case instituted the proceedings by request, either of the Governor or General Assembly. In our view the proceeding

should have been instituted, if at all, by the district attorney of the particular district at his own instance, or upon the complaint of any private party. With this view, both the provisions of the General Laws and the Code harmonize. Article 6, section 21, of the Constitution says: "There shall be elected, by the qualified electors of each judicial district, at each regular election for judges of the Supreme Court, a district attorney for each district, whose term of office shall be three years, and whose duties and compensation shall be as provided by law."

Section 895 (page 347, General Laws) is as follows: "Every district attorney shall appear in behalf of the State and the several counties of his district in all indictments, suits and proceedings which may be pending in the district court, in any county within his district, wherein the State or the people thereof, or any county of his said district, may be a party," etc.

The provisions of chapter 25 of the Code, section 260, is as follows: "An action may be brought by the district attorney in the name of the people of this State, upon his own information, or upon the relation and complaint of a private party against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the State, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor, and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party upon his own relation in the name of The People of the State."

Where, by statute, authority is given to a particular officer, its exercise by any other officer is forbidden by implication. Potter's Dwaris on Stat. 72,270; State v. Hastings, 10 Wis. 525; Conroe v. Bull, 7 Wis. 354.

The third objection made by the motion to quash the writ and dismiss the information was therefore well taken, and the court erred in overruling it. We do not consider it necessary to consider other questions raised by the record.

The judgment of the court below is reversed, and the cause remanded, with directions that the proceedings be dismissed.

Reversed.

THE CENTRAL AND GEORGETOWN ROAD CO.

v.

THE PEOPLE EX REL. TAYLOR.

(5 *Colorado Reports*, 39.)

It seems that under the constitution so much of any act as is not directly germane to the subject expressed in the title, is without force. That the provision of the constitution is a mandatory declaration of an essential condition to the validity of legislative enactments.

Under chapter twenty-five of the Code, a proceeding instituted for the purpose of remedying the usurpation or misuse of a corporate franchise or a public office, is by civil complaint and summons. The criminal form of the old action is superseded by civil action. In terms, chapter seventy-three of the Revised Statutes, authorizing proceedings by quo warranto, is repealed by section 477 of the Code.

It seems that a mere statement of legal conclusions, with a demand that the defendant show by what authority it exercises a franchise, as was anciently tolerated when the proceeding was by information in nature of a quo warranto, would not be sufficient under the Code.

A defect in pleading may be aided by pleading over.

A toll road company organized under the incorporation act of 1864 (Laws 1864, p. 66, § 28) may not establish and collect tolls at two gates distant less than ten miles from each other.

When the interpretation of a charter is doubtful, that construction is to be given to it which is most favorable to the public, provided it be equally reasonable.

It is competent for the commonwealth, through its courts, to waive a forfeiture of a charter, and it is generally its duty to do so when the infraction of its provisions is not wilful.

APPEAL from District Court of Clear Creek County.

The case is stated in the opinion.

Mr. Willard Teller, for appellant.

Mr. Thomas Mitchell, for appellee.

THATCHER, C. J.—Under chapter twenty-five of our Code of Civil Procedure, the district attorney of the first judicial district, in the name of the people, upon the relation of Frank M. Taylor, filed a civil complaint, and caused a summons to issue to the defendants in substantial compliance with the provisions of the Code.

The first question that presents itself for our consideration is the validity of chapter twenty-five, which concerns "Actions for the usurpation of an office or franchise." The title of the Code (of which this chapter is part) is "An act providing a system of procedure in civil actions in the courts of justice of the State of Colorado."

Our constitution provides (Sec. 20, Art. 5): "No bill . . . shall be passed containing more than one subject, which shall be clearly

expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Omitting the important italicized words, the constitutions of the States of California and Ohio contain the same provision. By the Supreme Courts of those States, it is held that this provision is not mandatory, and that a law passed in violation thereof would not be void. In *Pierpont v. Crouch*, 10 Cal. 315, Mr. Justice Field, speaking for the court, says: "The object of the constitutional provision was to secure some congruity or connection in the subjects embraced in the same statute, but as the provision is merely directory, it can only operate upon the conscience of the law maker. It creates a duty of imperfect obligation, for the infraction of which there is no remedy in the courts." In *Pim v. Nicholson*, 6 Ohio St. 180, construing the same provision, the court uses this language: "This provision being intended to operate upon bills in their progress through the General Assembly, it must be held to be directory only. It relates to bills, and not to acts. It would be most mischievous in practice, to make the validity of every law depend upon the judgment of every judicial tribunal of the State as to whether an act or a bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. . . . No practical benefits could arise from such inquiries. We are therefore of the opinion that in general the only safeguard against the violation of these rules of the houses, is their regard for and their oaths to support the constitution of the State."

The added words in the section of our constitution are quite significant, and apparently employed for the purpose of avoiding the construction placed upon the first part of the provision by the courts of California and Ohio. Perhaps there is no escaping the conclusion, that under our constitution, so much of any act as is not directly germane to the subject expressed in the title, is without force; that the provision, instead of being only a rule of the General Assembly to regulate their procedure, is a mandatory declaration of an essential condition to the validity of legislative enactments. If this be its true construction, it follows that if a proceeding instituted for the purpose of remedying the usurpation or misuser of a corporate franchise or a public office be in its nature substantially criminal, Chapter XXV. of the Code is without validity. Under this chapter the proceeding is by civil complaint and summons. The criminal form of the old proceeding is superseded by a civil action. In terms chapter seventy-three of the Revised Statutes, authorizing proceedings by information in the nature of a quo warranto, is repealed. Code, sec. 477. In obedience to the universally recognized rule that a sovereignty conferring a franchise may at any time, in its own appointed way and forms, inquire into the manner in which the franchise granted is used, we

entertain no doubt of the validity of Chap. XXV. nor of section four hundred and forty-seven of the Code. Potter's Law of Corporations, sec. 665.

Whatever may be the form of the action prescribed by the General Assembly, whether by information in the nature of quo warranto, or by the ancient writ of quo warranto, or by complaint under the Code in a civil action, the objects to be attained are identical, and the proceeding is, in substance, civil, instituted for the determination of purely civil rights. High Ex. Leg. Rem. Sec. 591; *King v. Francis*, 2 Term R. 484; *Angell and Ames on Corporations*, sec. 733; *Commonwealth v. Commissioners*, etc., 1 Serg. & Rawle, 380; *Commercial Bank, etc., v. The State of Mississippi*, 4 Smedes & Marshall, 504; *The People v. Utica Insurance Co.* 15 Johns, 386; *The People v. Cook*, 8 N. Y. 70; *State ex rel. Page v. Smith*, 48 Vt. 282.

We therefore conclude that the proceeding under the Code was properly instituted. The complaint alleges that the Central and Georgetown Railroad Company was incorporated on the thirteenth day of October, 1864, under the provisions of the General Act of the Territory of Colorado, entitled "An act to amend an act to enable road, ditch, manufacturing and other companies to become bodies corporate," approved March 11th, 1864; that the said company, in execution of the powers conferred upon them by the said act, erected in the year 1864 a toll gate upon their route at Fall River, in Clear Creek county aforesaid, and applied to the county commissioners of said county to prescribe the rates of toll to be collected thereat; that the said commissioners did, in October, 1864, prescribe such rates, and the said company have ever since collected tolls at said gate, and still continue so to do; that in the month of March last past (A.D. 1878), the said company erected a toll house at a point upon their route, between the town of Georgetown, one of the termini of said road, and Fall River aforesaid, in the county aforesaid, and have posted upon said house a notice of the rates of toll demanded by them thereat; that it is less than ten miles from the said toll gate at Fall River to the said last mentioned toll house, and that the rates of toll posted thereat as aforesaid have never been prescribed by the county commissioners of, or any tribunal transacting county business in, said Clear Creek county, as required by law; that the said company, for the space of at least three months last past, have exercised without any warrant, charter, or grant, the franchise of collecting toll at said last mentioned toll house, and have demanded and collected thereat large amounts of toll from a large number of persons travelling over said road between Georgetown and Fall River aforesaid, and intermediate points, and still continue so to do: wherefore judgment is demanded—1st. That the said defendant be excluded from all corporate rights, privileges and franchises; 2d. That the said

corporation be dissolved; and 3d. For costs of this action; and for such other and further relief in the premises as the case may require, and to the court may seem just.

To this complaint a demurrer was filed and overruled. A question is made in this court whether the complaint sets out the facts constituting the usurpation or cause of action within the meaning of the Code. Doubtless the mere statement of legal conclusions, with the demand that the defendant show by what authority it exercises a franchise, such as was anciently tolerated when the proceeding was by information in the nature of a quo warranto, would not be sufficient under the Code. *State v. Messmore*, 14 Wis. 120. Although the cause of action is perhaps defectively set out, as the case is not now before us on demurrer, and as the subsequent pleadings aided the complaint in this respect if it be defective, we do not deem it necessary to notice this objection. *DeLamar et al. v. Hurd*, 4 Col. 1; *Gould's Pl.* p. 154, sec. 192.

By the pleadings and evidence, the question is squarely presented whether a toll-road company organized under the Incorporation Act of A.D. 1864 (*Laws of 1864*, p. 57, sec. 28) may establish and collect tolls at two gates, distant less than ten miles from each other. The section under which the company was incorporated provides that "said company shall have the right . . . to erect toll gates, not to exceed one to every ten miles of road, and to collect tolls thereat at the rates prescribed by the county commissioners or the tribunal transacting county business, which rates shall be written, printed or painted in a legible manner, and conspicuously posted at each of such gates." The evidence shows that the Fall River gate and the gate near Lawson were distant eight miles from each other. The Fall River gate was first established. By the board of commissioners, at a duly convened meeting in October, A.D. 1864, it was, *inter alia*, ordered: "And it appearing to said board that said corporation desire to erect toll gates on said road, according to law, and desire said board to fix and establish the rates of toll at any such toll gate or gates: Now therefore, we, the said board of county commissioners, in consideration of the premises, and by virtue of the power and authority vested in us by law and by the act aforesaid, do order, adjudge and decree that the said corporation, styled 'The Central and Georgetown Road Company,' may erect toll gates upon said road, not to exceed one to every ten miles of said road, and may charge toll at said toll gate or gates, and the rates of charges at any such toll gates shall be as follows," etc.

It is needless to say that the board of county commissioners was powerless to authorize the erection of and taking of toll at more than "one gate to each ten miles." Their whole authority in the premises is based upon the statute under which the company was organized, and it is to be presumed that the rates of toll were

established in view of the existing law. The defendant contends that the language of the statute is complied with, if two or more gates be erected within a space of ten miles, provided that the whole number of gates erected on the road does not average in excess of one to each ten miles. This is a possible construction, but we do not think a reasonable one. It is not in the interest of the public that the gates should be close together. Where the interpretation of a charter is doubtful, that construction is to be given to it which is most favorable to the people, provided it be equally reasonable. The learned judge of the court below, in his opinion filed in this case, pertinently remarks upon the point under consideration as follows: "No other act, prior or subsequent, affects the status of a wagon road company organized under the law of 1864, either by extending or curtailing its powers, franchises and privileges; hence we must look to the act of 1864 as the source of all the powers and privileges granted to the defendant. It is argued by counsel for the defendant that this act did not fix the distance between gates, but only restricted the number of gates in respect to the entire length of the road, the limit being one gate to ten miles of road, which would entitle the company to two gates for twenty miles, leaving the place of location to the option of the company. If this be the proper construction of the statute, then the two gates upon the twenty miles of road may be located within one mile or even a shorter distance of each other. The consequences of such a construction of the statute would be both an inconvenience and an injury to the public. The greater portion, perhaps, of the travel upon a public road, is only over a portion of its entire extent, coming as it does from converging and intersecting roads. Under the rule contended for by defendant, it would be in the power of the company to impose the same burdens and inconveniences upon the traveller passing over about one half of the road, as upon those passing over the entire line. This would be inequitable, and could not have been contemplated by the law-makers; hence this construction of the act of 1864 must be rejected as unreasonable. The intention must have been to limit the distance between the gates to not less than ten miles."

We are in full accord with the views here expressed, and are consequently of opinion that the gate near Lawson was established and toll collected thereat without authority of law. We do not wish to be understood as intimating that in no event may there be two gates, where the length of the road is more than ten and less than twenty miles, or that if the entire length of the road is not ten miles there can be no gate. What we do decide is that wherever there are two gates or more, the distance between them must be not less than ten miles.

The court found that the defendant was guilty of unlawfully erecting and maintaining a toll house near Lawson, as a toll gate,

and was collecting tolls thereat without authority of law; wherefore it was adjudged that the defendant be excluded from further exercising the right and privilege of collecting tolls at the said toll gate, and that the defendant pay the costs of the action. It is competent for the commonwealth, through its courts, to waive a forfeiture of a charter, and it is generally its duty to do so where the infraction of its provisions is not wilful. Under the circumstances of this case, the judgment of the court in excluding the defendant only from the right and privilege of collecting toll at the gate near Lawson, was, we think, a proper judgment, and it will be affirmed.

Affirmed.

VIRGIL S. POND and others

v.

FRAMINGHAM AND LOWELL R. R. Co.

(180 *Massachusetts Reports*, 194.)

A bill in equity by creditors of a railroad corporation alleged that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for a long term of years, at a rental which would not pay the interest upon its indebtedness; and that the execution of the lease would be injurious to the interest of its creditors and stockholders. The prayer of the bill was for an injunction to restrain the corporation from further prosecuting its business, and for the appointment of receivers. *Held*, that the bill did not state a case within the equity jurisdiction of the court.

MORTON, J.—This is a bill in equity, the substantial allegations of which are, that the plaintiffs are creditors of the defendant corporation; that the corporation is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to said attaching creditor, for the term of nine hundred and ninety-nine years, at a rental which will not pay the interest upon its indebtedness; and that the execution of said lease would be injurious to the interest of its creditors and stockholders. The prayer is for an injunction to restrain the defendant from further prosecuting its business, and for the appointment of receivers.

There is no statute giving this court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393, "it is too well settled to

admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief."

The plaintiffs cannot maintain this bill, unless upon this ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust, or any other ground of jurisdiction, which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.

Decree dismissing the bill affirmed.

M. Williams & C. A. Williams, for the plaintiffs.

R. Olney, for the defendant.

GALVESTON, HARRISBURG & SAN ANTONIO R. R. Co.

v.

EMELINE L. BUTLER.

(56 Texas Reports, 506, 1882.)

—The plaintiff holding an unsatisfied judgment against the trustees of the B. B. & C. sold-out railroad company, brought suit against the trustees and against the G., H. & S. A. Ry. Co., which was indebted in a large amount to the former, alleging that this indebtedness constituted the only assets available for the satisfaction of her claim, asking judgment against the G., H. & S. A. R. R. Co. Twelve years had passed since the B. B. & C. company was sold out. The trustees made no answer. The G., H. & S. A. company answered by a general demurrer and denial, and alleging in general terms that the debts of the sold-out company exceeded largely its assets.

Held—

That from the lapse of time the presumption was that all the debts had been satisfied.

That from the silence of the trustees and the indefinite answer of the G.,

H. & S. A. company, the presumption was either that the debts had been satisfied, or that the assets were amply sufficient to pay all.

That such being the presumption, the suit by a single creditor to enforce payment of his judgment out of the trust fund was maintainable without attempting to make parties of other possible creditors.

That the answer set up no defence.

That the G., H. & S. A. Co. was protected, the trustees being parties to the suit.

APPROVED.—G., H. & S. A. Ry. Co. v. McDonald, 58 Tex. 510, approved and followed.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The Buffalo Bayou, Brazos & Colorado Railway Company being indebted to George Butler, the husband of appellee, prior to the 11th of June, 1868, the said Butler recovered a judgment against said company on the 18th of June, 1868. Seven days previous—on the 11th of June, 1868—the company executed an assignment of their railway, etc., to E. P. Hill, trustee, as a preliminary step and as one of the means of accomplishing a full and complete sale and transfer of said railway, etc., to a new company then contemplated and provided for in said assignment. The consideration for which was the payment of the debt of the old company and the annual payment of \$4,000 until such annual payment should cease by the payment of \$200,000 in bonds of the new company or in money, etc.

The new company was organized under the name of the old company, and by act of the legislature the name of the company was changed to "The Galveston, Harrisburg & San Antonio Railway Company."

As contemplated in the assignment, the new company purchased at sheriff's and trustees' sales said railway, and on or about the 1st of May, 1874, received and accepted from said Hill a full and complete transfer of said railway, etc., as was vested in said Hill by said assignment.

Afterwards George Butler transferred said judgment to his wife, the said Emeline L. Butler, as her own separate property.

Afterwards said Emeline, joined by her husband, in an action of debt on said judgment against James Sorley and others, surviving directors and trustees of said old company, recovered judgment against them on the 6th day of February, 1880. Executions issued on said judgment and were returned "no property." Afterwards, on the 12th of April, 1880, this suit was filed against the surviving trustees and the new company, to subject the indebtedness of said new company to said trustees to the payment of said judgment. The trustees failing to answer, judgment was rendered against them by default.

The new company filed a demurrer, and pleaded the statute of limitations against the \$4000 annual rental of the Columbus Tap,

etc., and also pleaded that the debts due and owing to the creditors of the old company, of the same class and standing in law as plaintiff's claim, far exceeded its assets, and that plaintiff was not in any event entitled to have more than a pro rata of such assets upon the distribution thereof among the creditors, which last plea, on exception, was stricken out and the demurrer overruled and judgment rendered for plaintiff, providing protection for the new company against future liability *pro tanto*.

From that judgment the new company prosecuted this appeal.

E. P. Hill, for appellant.

I. The court erred in overruling the demurrer of defendant to the petition of plaintiff.

1. So long as the trustees do not refuse to discharge the trusts reposed in them, so long as there is no violation of duty or conduct on their part prejudicial or inimical to the rights of the *cestui que trust*, the latter cannot institute or prosecute any proceedings which it is the right and duty of the trustees under the statute to institute and prosecute, and can exercise no control over them in the discharge of their duties. 11 Wall. 177; Field on Corporations, sec. 406, and cases cited in note 2, p. 432.

II. The court erred in sustaining the exceptions of plaintiff to the answer of defendant.

1. The effect of the statute (R. S., art. 4264) is to make the assets of the sold-out corporation, which is utterly extinguished, a trust fund to be administered by the trustees appointed by the statute (unless other persons shall be appointed by the court or legislature). It follows that such fund is to be administered for the common benefit of all the *cestui que trusts*, and no one of them has a right to payment in full of his debt, when the fund is insufficient to pay all the debts in full. There must be a pro rata distribution in such case. Pollard v. Bailey, 20 Wall. 527; Terry v. Tubman, 2 Otto, 161; Terry v. Little, 11 Otto, 216.

It must be supposed that the legislature had a purpose in view in enacting the law (art. 4264, R. S.), and the court will give effect to that purpose. The effect and intention of the law is plainly to create an express trust for the benefit of creditors. In other words, the effect of the act is to assign the assets of a sold-out railroad corporation to trustees for the benefit of creditors. Bliss on Code Pl., sec. 81, note 4, last sentence; Hallett v. Hallett, 2 Paige, 18; Egbert v. Woods, 3 Paige, 520; 1 Daniel's Ch. Pl. & Prac., p. 285, note 2; pp. 287-9; p. 293, note 2; Perry on Trusts, secs. 594, 602; 2 Story's Eq. sec. 1037; Story's Eq. Pl. sec. 157; R. R. Co. v. Le Gierse, 51 Tex. 189; Thomas v. Walsh, 44 Tex. 160; Caton v. Jones, 21 Tex. 788. If the theory of plaintiff's counsel be correct, then the demurrer should have been sustained, because the remedy simply of a writ of garnishment should have been pursued.

John T. Brady and James G. Walker, for appellee.

GOULD, CHIEF JUSTICE.—In its leading features and in the questions involved this case does not materially differ from the case of the same company against McDonald, 53 Tex. 510. In that case the judgment was affirmed, and in this case, after a very careful reconsideration of the questions presented, our conclusion is the same—that this judgment also should be affirmed. It is deemed proper, however, to state our views sufficiently to prevent any possible mistake or misconception as to the grounds on which our conclusion is reached. In the first place, we do not regard this as a bill in equity by one creditor to enforce his right to payment out of a trust fund created for the common benefit of himself and other creditors, wherein he seeks to proceed regardless of the rights of other creditors, and to appropriate to himself a fund insufficient to meet the demands of all entitled to it.

The authorities are clear that a creditor seeking to enforce the trusts under an assignment cannot sue alone, but must either make the other creditors parties, or must bring his suit in behalf of himself and all the other creditors who may choose to come in and take the benefits of the decree. Story's Eq. Pl., secs. 8, 157 and 219a; Perry on Trusts, sec. 594; 1 Dan. Ch. Pr. 1st. Am. ed. p. 285; Bispham's Eq. 469, 470; Pomeroy on Remedies, sec. 358. Where there is an insufficient trust fund, it would be clearly inequitable to aid one of the beneficiaries, having no rights superior to the others, to appropriate more than his pro rata share of the fund, and that too without giving the other beneficiaries an opportunity to contest his proceeding. If the petition of Mrs. Butler stated such a case, or if in the progress of the case it appeared that such was the character of the case, the plainest principles of equity would be violated by granting the aid of the court to the consummation of such a wrong.

The authorities relied on by the appellees to show that other creditors were not necessary parties will be found insufficient to support this case, if indeed it had been one of the character just described. McDermutt v. Strong was a case in which a creditor had acquired a lien superior to that of any other creditor, and his right to legal priority in consequence of that lien was allowed. His appeal to equity was not based on his rights under a trust, but on rights superior thereto. 4 Johns. Ch. 691. The same is true of the case of Edmeston v. Lyde, 1 Paige's Ch. 636. That case was distinguished by Chancellor Walworth, in the subsequent case of Wakeman v. Grover, from one in which "complainants were seeking to carry into effect the assignment, and to obtain their share of the assigned property," where he says, "it would undoubtedly have been necessary, either that they should have made all the creditors parties, or they should have filed their bills in behalf of themselves

and all others who might choose to come in under the decree." 4 Paige's Ch. 33. In *Pomeroy on Remedies* it is said: "There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, and to procure it to be wound up and settled. In the first case the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them. In the second, all the beneficiaries must be joined, if not as plaintiffs, then as defendants, so that the whole matter may be adjusted in one proceeding and a multiplicity of suits avoided. The reason of this distinction is obvious. It is that any one person interested in opposition to the trust has a right to test the validity thereof, and his voluntary action cannot be controlled by the will of others, while the trustees themselves are sufficient to represent and defend all the interests of those who claim under the trust. But when the trust is assented to and the purpose is simply to carry out its provisions, all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding." See also *Hallett v. Hallett*, 2 Paige's Ch. 15; *Egberts v. Wood*, 3 Paige's Ch. 520; *R. R. Co. v. Orr*, 18 Wall. 473; *Kerrison v. Stewart*, 93 U. S. 160; *Campbell v. R. R. Co. 1 Woods*, 368; *Galv. R. R. v. Cowdrey*, 11 Wall. 478-9.

But in the present case we think under the averments of the petition, taken in connection with the acquiescence of the trustees in the judgment, taken also in connection with the indefinite allegations of the assignee as to other creditors, it is to be presumed that the claims of all other creditors have been paid or that the fund is ample for the full satisfaction of any which may remain.

More than the longest period of limitation known to our laws had elapsed since the old company had been sold out and their unsold assets passed into the charge of the trustees. There is certainly good reason to presume that in the course of twelve years the claims of creditors have been in some way adjusted. *Mumford v. Murray*, 5 Johns. Ch., is authority for refusing to compel the plaintiffs to bring in the other beneficiaries of the trust, where the presumption was that their demands were stale. The suit was by parties claiming under an assignment to enforce their rights under it, and it appeared by their bill that there were other creditors for whose benefit the assignment was also made. After saying that the presumption, after a silence of twenty years, is that the claims of those creditors have been abandoned, Chancellor Kerr says: "We cannot in sound discretion suspend this cause merely to compel the plaintiff to bring in parties resting on such stale demands and with such presumptions against them."

In regard to this identical trust fund, this court, after the lapse of four years, refused to presume that there were other creditors entitled to protection, and allowed a judgment creditor to proceed to levy on the fund in the hands of these trustees. *Good v. Sherman*, 37 Tex. 660. The trustees were before the court, and if there were other creditors whose interests were liable to be injuriously affected by the decree, it was their duty to protect the trust fund, and they should have answered making the facts known to the court. Their acquiescence must be taken as their admission either that there were no other creditors remaining, or that the trust fund—the indebtedness of the appellant to them—was ample to pay all the creditors in full. If they had answered admitting the sufficiency of the assets, and the court had been satisfied that the presumption was that all other creditors were paid or were content, then there was no good reason why the court should not give its aid to ascertain the liability of the appellant to the trustees, and to enforce payment of plaintiff's claim out of that fund. Says Chancellor Walworth, speaking of a suit by legatees: "I understand the rule in that case to be, if the executor admits a sufficiency of assets, there is to be a decree for the payment of the particular debt or legacy, without any general decree for account." *Hallett v. Hallett*, 2 Paige Ch. 21.

To this explanation of the grounds on which we proceed in affirming the judgment, we will only add that we do not regard the special answer of the railroad company as presenting any valid defence, whether regarded as a plea in abatement or a plea to the merits. The trustees being before the court and acquiescing in the judgment, appellants are protected as fully as if the recovery had been in the name of the trustees. Regarded in this light, it is not perceived that appellant has any interest in the distribution of the money recovered, or can complain that it has been in any way injured by the action of the court.

Being satisfied that the justice of the case has been reached, and that the court committed no error to the prejudice of the appellant, it is ordered that the judgment be affirmed.

Affirmed.

BRANCH and others

v.

JESUP, surviving Trustee, and another.

(Advance Case, U. S. Supreme Court. January 15, 1883.)

The South Georgia and Florida Railroad Company, having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany and Gulf Railroad Company to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany and Gulf Railroad Company. *Held*, that this contract was not ultra vires.

The Albany and Gulf Railroad Company had the same general power, except that of incorporating its stock with that of other companies, and had the right under its charter also to construct a railroad from Thomasville to Georgia. *Held*, that it was not acting ultra vires to make the purchase of said road and franchises as above stated, and to pay for the same by issuing its own stock therefor, which was delivered to and accepted by the contractors in lieu of the stock of the South Georgia and Florida Railroad Company, which latter stock they had subscribed for and agreed to take in payment for the work of construction.

When a railroad company has the right of constructing a particular line of railroad, with general power to purchase all kinds of property, of whatever nature or kind, it may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same.

As a general rule, a corporation cannot dispose of its franchises, nor a railroad company its road, without legislative authority; but in this case it was *held* that the legislative authority existed.

Prior to the purchase of the railroad the Albany and Gulf Railroad Company had executed a trust deed by way of mortgage upon all its railroad and property acquired or to be acquired. *Held*, that, inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the said road, when purchased, the same as it would have done had the company itself constructed it.

The contractors who built the road and accepted in payment therefor the stock of the Atlantic and Gulf Railroad Company in lieu of that of the South Georgia and Florida Railroad Company, and the assignees and purchasers of said stock, after the transaction between the two companies has been carried into effect and the road has been possessed and operated by the Atlantic and Gulf Railroad Company for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia and Florida Railroad Company, or as preferred creditors as against the railroad itself. Having voluntarily accepted the position of stockholders of the purchasing company, they cannot question the validity of the transaction adversely to it, or to the mortgage given by it, covering the road in question.

The stock thus issued and accepted was preferred stock, on which interest

was payable. *Held*, that the holders thereof, and their assigns, having accepted it, and received interest on it for several years, are estopped from questioning the power of the company to issue such preferred stock.

The South Georgia and Florida Railroad Company, having received all it stipulated for, and having incorporated its stock with that of the Albany and Gulf Railroad Company, by accepting the stock of that company in lieu of issuing its own stock, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by the Atlantic and Gulf Railroad Company. It has lost nothing. It has not incurred any liability which is not protected by first liens on the road, the priority of which is conceded by all parties.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

W. W. Montgomery, for appellants.

W. S. Chisholm and R. Falligant, for appellees.

BRADLEY, J.—This case arises upon a bill filed by Morris K. Jesup, as surviving trustee, for the foreclosure of a deed of trust in the nature of a mortgage, bearing date of December 20th, 1867, given by the Atlantic and Gulf Railroad Company of Georgia to said Jesup and one Gardner (since deceased) to secure the payment of certain bonds of the company to the amount of \$2,000,000, payable in 1897, with interest. The bill was filed February 15th, 1877, and on the 19th of the same month receivers were appointed to take charge of the mortgaged property, being a railroad of the company, with its rolling stock and machinery. A supplemental bill was filed on the 20th of April, 1877. The only defendant named in either bill was the Atlantic and Gulf Railroad Company. The premises sought to be foreclosed were—First, the main line of the company's road, extending from Savannah south-westerly and westerly to Bainbridge, in Georgia, a distance of about 237 miles; secondly, a branch road, extending from Dupont to the Florida line, about 32 miles, connecting, thirdly, with a short road in Florida, extending to Live Oak, in that State, which the company held and operated under a lease; fourthly, a branch road about 58 miles in length, extending from Thomasville, on the main line, northerly to Albany, Georgia; fifthly, two other small branches at Savannah, one connecting the main line with wharves on the Savannah river, and the other connecting it with the Savannah and Charleston Railroad. The Thomasville branch was purchased from the South Georgia and Florida Railroad Company in 1868 (shortly after the giving of the mortgage in suit) for the purpose of extending the line to Albany; which branch was subject to certain bonds and mortgages issued by the latter company, having a lien paramount to the mortgage in suit. The other branches were, in like manner, severally subject to certain prior mortgages, given for purchase money or construction, and having a para-

mount lien. The bill conceded the priority of the several liens. The defendant answered, specifying the liens on its property prior to that of the mortgage, and insisting that it would be inequitable to foreclose and sell at that time, although consenting to the appointment of receivers.

On the 22d of April, 1878, Branch, Sons & Co. and others (who are appellants here) petitioned for and obtained leave to intervene *pro interesse suo*, claiming to be preferred creditors of the Atlantic and Gulf Railroad Company, as to the proceeds and earnings of the South Georgia and Florida Railroad; that is, the branch from Thomasville to Albany. By amendment to the petition the South Georgia and Florida Railroad Company was also made a party, and a prayer was added to have declared void the sale of the said branch road and for its restoration to the South Georgia and Florida Railroad. By their petition of intervention the appellants insisted that the lien of the mortgage sought to be foreclosed does not cover the branch aforesaid; that the petitioners and others are holders of certificates of special guaranteed 7 per cent stock of the Atlantic and Gulf Railroad Company to the amount of some \$300,000, of which the petitioners own \$56,100; that these certificates were issued by the Atlantic and Gulf Railroad Company under a contract with the South Georgia and Florida Railroad Company, dated January, 1869, for the construction of its road from Thomasville to Albany; a copy of which contract and certain modifications of it, and a copy of one of the certificates, were annexed to the petition. The petitioners further contended that the earnings of that branch road, if kept by themselves, would be sufficient not only to pay the interest on the preferred bonds of the South Georgia and Florida Railroad Company, but to pay the interest on said certificates; that the guaranteed scrip was given for the purchase of the South Georgia and Florida Railroad, and was distributed among the contractors who built it in payment for their labor; that it is in effect the promissory notes of the Atlantic and Gulf Railroad Company, and that the holders could proceed by attachment if the property of that company were not in the hands of receivers; and after making further averments as to the solvency of the South Georgia and Florida Railroad Company, if it stood alone, unconnected with the Atlantic and Gulf Railroad Company, the petitioners prayed for themselves, and the other holders of certificates, to be examined *pro interesse suo* touching their alleged paramount claim upon the proceeds of the South Georgia and Florida Railroad after payment of interest on its bonds, and for an order directing such examination before the master, and for other directions.

In the amended petition the petitioners averred that the original holders of the certificates of preferred stock before mentioned were subscribers to the capital stock of the South Georgia and Florida

Railroad Company, and paid their subscriptions by work done on the road, for which they received the said certificates of preferred stock in the Atlantic and Gulf Railroad Company, and that the present holders are bona fide purchasers of said scrip, except in some instances where the original holders have not parted with their scrip; and they alleged that when the contracts between the two companies were executed it was supposed that they had power to enter into the same; but that they are now advised that the contracts were ultra vires and void, and they prayed a rescission and the cancellation thereof; but if the court should decree that the contract only amounted to a lease of the road (which they conceded would not be ultra vires), then they prayed that it may be rescinded for non-compliance with its terms, and the inability of the Atlantic and Gulf Railroad Company to comply therewith. But if the court should think there was a valid contract of sale, then they repeated their prayer to be decreed to have a first lien on the proceeds of the road after the mortgages executed thereon by the South Georgia and Florida Railroad Company, and for a separate sale of that road subject to said mortgages.

The first contract referred to in the petition bore date June 19th, 1868, and provided that the South Georgia and Florida Railroad Company should complete its road from Thomasville to Albany, and turn it over in sections, as completed, to the Atlantic and Gulf Railroad Company, and that, when completed to Albany, the stock of the South Georgia and Florida Railroad Company should be incorporated with the stock of the Atlantic and Gulf Railroad Company, and that interest at the rate of 7 per cent per annum on the actual cost of the road should be paid as well before such incorporation of stock as on said stock after its incorporation; and that, when the stock should be thus incorporated, all the rights, privileges, and franchises of the South Georgia and Florida Railroad Company, so far as related to the road from Thomasville to Albany, should vest in the Atlantic and Gulf Railroad Company, and said road should be a branch of the Atlantic and Gulf Road. This contract was modified by another contract made January 15, 1869, which recited that the legislature of the State had passed an act authorizing the State to indorse the bonds of the South Georgia and Florida Railroad Company to the amount of \$8000 per mile; and that the Atlantic and Gulf Railroad Company consented to the issue of said bonds, and a first mortgage to secure them, and guaranteed their payment; and it was stipulated that the amount of said bonds should be deducted from the amount of preferred stock to be issued to the South Georgia and Florida Railroad Company for the construction of the road. Another agreement, made September 1, 1869, authorized the further issue of bonds by the South Georgia and Florida Railroad Company to the amount of \$200,000, to be

secured by a second mortgage on the road, and guaranteed by the Atlantic and Gulf Railroad Company.

The road appears to have been completed to Albany prior to October, 1870. On the tenth of that month the following resolution was passed by the board of directors of the South Georgia and Florida Railroad Company:

"Whereas, the South Georgia and Florida Railroad Company entered into an agreement with the Atlantic and Gulf Railroad Company, on the nineteenth day of June, 1868, by which a transfer of the said South Georgia and Florida Railroad was to be made (that is, all of said road between Thomasville and Albany) upon certain conditions therein stipulated, all of which will more fully appear by reference to said agreements; and whereas, the South Georgia and Florida Railroad has been completed to East Albany and the same has been turned over to the Atlantic and Gulf Railroad Company, and which is now being operated by said Atlantic and Gulf Railroad Company; and whereas, the president of the Atlantic and Gulf Railroad Company has signified his willingness to receive said road finished to East Albany; and whereas, the South Georgia and Florida Railroad Company have made up the entire cost of said road and made affidavit certificate under oath as prescribed by said agreement,—it is therefore resolved that the president of this road proceed to Savannah, submit his estimates and certificates, and demand and receive the guaranteed stock agreed to be given to the South Georgia and Florida Railroad stockholders under said agreements in terms of the several agreements made by the South Georgia and Florida Railroad Company with said Atlantic and Gulf Railroad Company. Resolved, further, that the president be, and he is hereby, authorized to make, execute, and deliver all papers necessary to carry out and fulfil said agreements for a transfer of so much of said South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, specially reserving the other franchise or rights of building and equipping a railroad from Thomasville to the Florida line under the charter of the South Georgia and Florida Railroad Company."

This resolution was duly carried into effect shortly after its adoption, as appears by a final contract executed in due form between the companies, bearing date January 8, 1876, which recited the several prior contracts, and the said resolutions, and the fact of their acceptance and of the performance and fulfilment of the same, and by which the South Georgia and Florida Railroad Company made a formal conveyance to the Atlantic and Gulf Railroad Company, its successors and assigns, forever, of so much of the South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, with all the appurtenances thereof, including the franchises of the South Georgia and Florida Railroad

Company to construct and use the same. The certificates of stock issued by the Atlantic and Gulf Railroad Company in pursuance of said contract were regular scrip certificates for preferred stock in that company, in the following form:

"Atlantic and Gulf Railroad, Georgia. Special guaranteed 7 per cent stock issued under a contract with the South Georgia and Florida Railroad Company, bearing date January 2, 1869, for the construction of the South Georgia and Florida Railroad. This is to certify that Branch & Sons, or bearer, is entitled to 66 shares, on which the par value of \$100 has been paid, of the special stock of the Atlantic and Gulf Railroad Company, on which interest from date is perpetually guaranteed at the rate of 7 per cent per annum, payable semi-annually, etc. Witness, etc. Sealed, etc., first day of November, 1872.

[Signed] JOHN SCRIVEN, President.

"Attest: D. McDONALD, Secretary."

No evidence was taken in the case, and the hearing was had on bill and answer. It was conceded, or, at least, not controverted, that the intervenors were holders of the stock certificates as claimed in their petition, and that said certificates originated in the manner and in fulfilment of the contracts therein set forth. The court below denied the prayer of the intervenors and dismissed the petition, and went on to make a final decree in the cause, ordering a foreclosure and sale of the railroad of the Albany and Gulf Railroad Company, with all its branches, including the branch from Thomasville to Albany, subject, however, to all prior mortgage liens, including the first and second mortgages on the Thomasville branch. From this decree the intervenors have appealed.

The questions raised by the appellants, as stated in their brief, are as follows:

(1) Was the sale of a part of the South Georgia and Florida Railroad and its franchises to the Atlantic and Gulf Railroad void as against public policy and ultra vires?

(2) If not, did the contract amount to anything more than a lease?

(3) If it was a sale, are not the South Georgia and Florida Railroad Company and other intervenors vendors with the purchase money unpaid, and hence entitled to assert their right of attachment upon the property sold, in preference to the claims of the mortgage creditors of the vendee, the Albany and Georgia Railroad Company?

(4) If the intervenors are not entitled to attach as vendors, are they not creditors of the Albany and Gulf Railroad Company, and entitled to be paid out of property of the debtor which is not covered by the mortgage; and in this case does the mortgage cover the South Georgia and Florida Railroad?

If only stockholders, can they not object to the sale of the South Georgia and Florida Railroad under the present proceedings?

The court below was of opinion that the sale and purchase of the road was not void, nor ultra vires of the two contracting companies, without examining the question of the right of the appellants to contest the validity of the transaction. We will proceed to give some examination into that question.

The appellants are stockholders of the Atlantic and Gulf Railroad Company. Their stock is preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock. It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of preferred dividend, and is sometimes so called. Though after it has accrued it may become a debt, so also does a dividend become a debt after it has been declared and has become payable. It has no priority over other debts, if, indeed, it has an equality with them. And this position, as stockholders of the Atlantic and Gulf Railroad Company, was voluntarily assumed by the appellants. This is true, both of those who purchased their stock at second hand, and of those who originally received the stock. They probably deemed it to their interest to accept payment for their work in this form. But again, not only are they stockholders in the Atlantic and Gulf Railroad Company, but the acceptance of the stock was an acknowledgment of the validity of the contract between the two companies. The issue of the stock was in part performance of that contract, and this appears upon the face of the certificates. After thus acquiescing in the purchase by the Atlantic and Gulf Railroad Company of the branch railroad in question, and of the amalgamation of stock incident to said purchase, and after the possession and use of said road and its franchises by the said company as a part of its road system for a period of several years, the appellants are estopped from questioning the validity of said transaction, and cannot now repudiate their character of stockholders of the Atlantic and Gulf Railroad Company, and assume that of stockholders of the South Georgia and Florida Railroad Company. To sustain such a course on their part would have the effect of ripping up and unravelling a thousand transactions which have taken place on the basis of the purchase and amalgamation referred to. Whatever right the State may have to inquire into the validity of such purchase and amalgamation, certainly the appellants have no right in law or in equity to question it. In law, they are stockholders of the purchasing company, in which character they neither can nor do ask any relief; in equity, they are participants in the face of all the world in a transaction which is conceded to have been fair and supposed to be lawful at the time, and upon the faith of which numberless transactions in business,

and in the stock and bonds of the purchasing company, have undoubtedly been entered into. To give to the appellants relief in any form in which it is asked, would be attended with injury and injustice to others who have innocently confided in the acts of the appellants and their associates. We might safely stop here and affirm the decree below on this consideration alone. But as our view of the other questions which have been raised leads to the same result, it may be proper to state the reasons therefor.

The first relates to the power of the two companies to enter into the arrangement for the sale and purchase of the Thomasville branch. The power of the South Georgia and Florida Railroad Company to sell the road depends upon its charter, which took its origin in an act of the legislature approved January 22d, 1852, creating the Georgia and Florida Railroad Company, with power to construct a railroad from Oglethorpe, or some other point on the Southwestern Railroad, to Albany; also with power to construct a railroad from Albany to Thomasville, and from thence to the Florida line in the direction of Tallahassee; also a plank or macadamized road in connection with the railroad; and for the purpose of constructing said road or roads, procuring right of way, and managing all its affairs, the said company was invested with the same powers and privileges granted to the Savannah and Albany Railroad Company, not inconsistent therewith; and it was enacted that the said Georgia and Florida Railroad Company might at any time incorporate their stock with the stock of any other company on such terms as might be mutually agreed upon. The company was further authorized, from time to time, to determine the amount of stock necessary to carry out its purposes and the construction of said road or roads. The powers given in this charter by adoption and reference to the charter of the Savannah and Albany Railroad Company consisted, as expressed in the charter of the latter company, of all the rights, privileges, and immunities which by the laws of Georgia were held or enjoyed by any incorporated railroad company or companies in the State; and by a reference to prior existing charters we find that, so far as relates to the question in hand, these powers were, "To have, purchase, possess, enjoy, and retain lands, rents, hereditaments, tenements, goods, chattels, and effects, of whatsoever kind, nature, or quality the same may be, and the same to sell, grant, demise, alien, or dispose of."

All the powers thus given to the Georgia and Florida R. R. Co. in 1852 were conferred upon the South Georgia and Florida R. R. Co. by an act passed December 22d, 1857. By this act the South Georgia and Florida R. R. Co. was created, and the line of road which the Georgia and Florida Co. was authorized to construct from Albany to Thomasville, and thence to the Florida line, was separated from the rest and granted to the South Georgia and Florida

R. R. Co., which company was invested with the usual powers to purchase, hold, and convey property, real and personal, and with specific power to construct a railroad from Albany "to Thomasville," "and from Thomasville to any point on the Florida line," and to connect with any other road at such points as they should deem best; and it was enacted "that the provisions of the act incorporating the Georgia and Florida R. R. Co., so far as applicable, shall be applied to said South Georgia and Florida R. R. Co." By reference and adoption, therefore the latter company became invested with all the authority and power, in regard to the line between Albany and Thomasville, and between Thomasville and the Florida line, which had been conferred upon the Georgia and Florida R. R. Co. It seems to us clear that these powers were sufficient to enable the company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company.

In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply. In view of the large power thus conferred upon the South Georgia and Florida R. R. Co., we cannot doubt

that it had full power to enter into the arrangement made with the Atlantic and Gulf R. R. Co. for the transfer of that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the same, and an incorporation of all its stock issued for the construction of said road with the stock of the latter company.

It is true that the South Georgia and Florida R. R. Co. did not part with its entire franchise. Power was given to it by its charter to construct a road from Thomasville to the Florida line (being a distance of about fifteen miles due south), and to connect with any other road at such points as it might deem best. But this extension is mentioned as a distinct enterprise, has never been entered upon, and would have no value without a connection with some railroad in Florida, for which, so far as appears, no authority has thus far been accorded by that State. The authority to make it is nominal only, if it has not entirely expired by lapse of time; and could be of little use to the Atlantic and Gulf R. R. Co., which had a connection of its own with the Florida system of railroads at Live Oak. The retention of this nominal franchise by the South Georgia and Florida R. R. Co., which has never issued any capital stock under it, or with a view to its use, seems to be in reality a mere shadow without any substance. All the capital stock which the company ever provided for was that which went to the building of the road from Thomasville to Albany, and that, at its very inception, was incorporated with the stock of the Albany and Gulf R. R. Co.; the stock of the latter company being issued and accepted in the place of it. So that, in truth, the terms of the charter have been literally carried out. At all events, we think that the arrangement made with the latter company was within the powers given to the South Georgia and Florida R. R. Co.; and this arrangement was fully assented to and acquiesced in by every subscriber to its stock, as before mentioned.

In this connection it is proper to notice a fact which has been referred to by the counsel of the appellants in support of his views, but which seems to us corroborative of the view which we have taken of the powers of the South Georgia and Florida R. R. Co. The original route authorized to be taken by its parent company, the Georgia and Florida R. R. Co., extended, as we have seen, from Oglethorpe, or some other point on the Southwestern Railroad, to Albany, with authority also to construct a railroad from Albany to Thomasville, and from thence to the Florida line. Afterwards, as we have also seen, in December, 1857, the South Georgia and Florida R. R. Co. was created, and that portion of the route extending from Albany southward to Thomasville and the Florida line was transferred to the latter company, with all the general powers of the parent company, among which was the power to incorporate its stock with that of any other company. The northern part of

the original route, extending from Albany northward to Americus, a point of connection with the Southwestern Railroad, still remained under the original charter; and this part (between thirty and forty miles in length) was afterwards transferred to the Southwestern R. R. Co. with an incorporation of stock, similar to what was done by the South Georgia and Florida R. R. Co. with the southern part of the line. But it seems that the Southwestern R. R. Co. had not sufficient unissued stock to pay for the road thus acquired. Whereupon an act was passed by the legislature "to amend the charter of the Southwestern R. R. Co., and to authorize an increase of the capital stock of said company," etc., by which, after reciting the power given to the Georgia and Florida R. R. Co. to incorporate its stock with the stock of any other company, further recited that the latter company had agreed with the Southwestern R. R. Co. to incorporate its stock with the stock of that company, and had delivered its railroad running from Americus to Albany to the Southwestern R. R. Co., and had received stock of the said company to the amount of near \$500,000, and that it thereby became necessary to increase the capital stock of said Southwestern R. R. Co. It was therefore enacted that the latter company be authorized to issue stock in addition to the amount mentioned in its charter for any sum not exceeding \$500,000, and that the road from Americus to Albany should be considered part and parcel of the road of the Southwestern R. R. Co., and be liable to pay to the State the same tax that the rest of the Southwestern R. R. Co. was liable to pay. This arrangement, which the legislature thus enabled the Southwestern R. R. Co. to carry out (and in doing so recognized its validity), was precisely similar to that which had been made between the South Georgia and Florida R. R. Co. and the Atlantic and Gulf R. R. Co. in regard to the road from Albany to Thomasville. The only difference between the two cases was that the Southwestern R. R. Co. had to get power to issue additional stock—a power which the Atlantic and Gulf R. R. Co. did not need, as it already had authority to issue the amount of stock required for carrying out its arrangement with the South Georgia and Florida R. R. Co.; at least, it is so stated, and is not denied, nor is the contrary alleged in any of the pleadings.

The point taken in relation to the issue of stock by the Atlantic and Gulf R. R. Co., in payment of the road purchased by it, is not that the company had no power to issue that amount of stock, but that it had no power to issue preferred stock. But it hardly lies in the mouth of those who received this stock, and who for several years accepted the interest guaranteed to be paid thereon, to make this objection, especially as no other parties, neither the State nor the holders of the common stock, have ever objected to the issue of this preferred stock. Without entering, therefore, into a discussion of the abstract question whether a railroad company may not

issue a preferred stock, when done in good faith, instead of issuing bonds to the same amount, it is sufficient to say that the appellants are not in a position to raise the question. But, supposing it to be shown that the South Georgia and Florida R. R. Co. had the power to sell, had the Atlantic and Gulf R. R. Co. the power to buy the road in question? The latter company was formed by the amalgamation of two distinct companies, and became invested with all the powers contained in the charters of both. These companies were—First, the Savannah, Albany and Gulf R. R. Co., chartered in 1847, under the name of the Savannah and Albany R. R. Co.; and, secondly, the Atlantic and Gulf R. R. Co., chartered in 1856. The first of these companies was authorized to construct a railroad communication between Savannah and Albany, by such route as the company might select, with such branch road towards the north and towards the south from said road to such point or points as they might deem requisite; with power also, at any time, to extend said road to any point or points on or across the Chattahoochee River. Besides the ordinary corporate powers given to this company, it was invested, as already mentioned, “with all the rights, privileges, and immunities which, by the laws of Georgia, are held and enjoyed by any incorporated railroad company or companies.” The Georgia R. R. and Banking Co. had been chartered in 1835. Other railroad companies in Georgia, then in existence, had power “to have, purchase, receive, possess, enjoy, and retain lands, rents, tenements, hereditaments, goods, chattels, and effects of whatsoever kind, nature, or quality, and the same to sell, grant, demise, alien, or dispose of.” See charters of Georgia R. R. and Central R. R. Co., Prince, Dig. 311, 326. The second of the companies consolidated as aforesaid, to wit, the Atlantic and Gulf R. R. Co., had power to construct a railroad from a point in Wayne County, southwest of Savannah, to the western boundary of the State south of Fort Gaines, being in a general westerly direction across the southern part of the State; but it was provided that the Savannah, Albany and Gulf R. R. Co., as well as the Brunswick and Florida R. R. Co., might join their tracks with that of the Atlantic and Gulf R. R. Co. The latter company was invested with all the privileges, immunities, and exemptions granted to the Central and to the Georgia R. R. Companies, or either of them.

The two companies, Savannah, Albany and Gulf, and Atlantic and Gulf, were consolidated under the name of the latter company by virtue of an act passed in April, 1863, by which it was provided that “the several immunities, franchises, and privileges granted to said companies by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue in force.” From these charters and laws it appears that the consolidated company had power to construct a railroad from Savannah to the southwestern border of the State; and, among other things, to construct

a railroad communication between Savannah and Albany, and to make branch roads towards the north and towards the south; and, even before the consolidation, the Savannah and Albany Company was authorized to join its track to that of the Albany and Gulf Company; so that the line of roads, as finally located, constructed, and acquired, including the branch from Thomasville to Albany, cannot be said to have departed in any respect from the strict course pointed out and designated by the charters of the consolidated companies. The main line commences at Savannah, under the charter of the Savannah and Albany Company, and runs southwesterly to Wayne County, and thence, under both charters (for both companies were authorized to use the same track), westwardly to Thomasville and Bainbridge, in the southwestern part of the State, with a branch running from Dupont towards the south into Florida, and a branch from Thomasville towards the north to Albany, forming a railroad connection between Savannah and Albany. In making the railroad connection between Savannah and Albany, the original charter of the Savannah and Albany R. R. Co. could not be construed to require that this connection should be made by a rigidly straight line. The directors were invested with reasonable discretion as to the route to be taken; and since the subsequent legislation expressly authorized the Savannah and Albany Company to join its track with that of the Albany and Gulf R. R. Co., it is clear that the line of the latter company was not regarded as an improper departure for that of the former. Indeed, by an act passed in 1857, the Albany and Gulf R. R. Co. were required to get the release of the Savannah and Albany Company of its right of way over the line of its contemplated road, before it could have the State subsidy proposed to be given to it; which plainly shows that the line of the Albany and Gulf road (which properly lay through Thomasville) was regarded as within the fair limits of the route granted to the Savannah and Albany Company. This being so, the branch road from Thomasville to Albany was fairly within the power and authority given to the Savannah and Albany Company by its original charter, to establish a railroad connection between Savannah and Albany.

Then, since the consolidated company had authority to construct a railroad from Thomasville to Albany, and to establish the railroad connection between Savannah and Albany in that way, and had the general power to purchase and receive property of every conceivable kind, nature, or quality (limited, of course, by the general objects of its charter), what was to hinder its purchasing from the South Georgia and Florida R. R. Co. its line of road between Thomasville and Albany, and paying for it by the issue of its own stock—an arrangement which, as we have seen, the South Georgia and Florida R. R. Co., on its part, had a perfect right to make? It seems to us that this question is not hard to answer; but that it

is clear that the one company had the right to purchase this road as fully as the other company had the right to sell it; and that the right of both was fully given by the charters and laws which gave them their respective powers. We do not mean in the slightest degree to disaffirm the general rule that a corporation cannot dispose of its franchises to another corporation without legislative authority; but we think that the authority clearly existed in this case, being fairly derived from the legislation which affected the two companies, without any forced or strained construction of its terms.

The second question raised by the appellants, namely, whether the contract amounted to anything more than a lease, has been sufficiently answered by what has already been said. The transaction between the companies had in view a transfer of the entire interest of the South Georgia and Florida R. R. Co.

The third question raised is whether the South Georgia and Florida R. R. Co. and the other intervenors are not vendors whose purchase money is unpaid, and who are thence entitled to assert a right of attachment upon the property in preference to the claims of the mortgage creditors of the Atlantic and Gulf R. R. Co., the vendee? The original intervenors are certainly not entitled to assume any such position. As already shown, their status is fixed by their own choice as stockholders of the Atlantic and Gulf R. R. Co. They are such, and nothing more, except as to the interest due on their stock, as to which they are nothing more than general creditors. As to the South Georgia and Florida R. R. Co., it has no claim at all. It received all that it stipulated for. The priority of its bonds and mortgages is fully conceded; and its stock, so far as the railroad in question is concerned, was incorporated with that of the Atlantic and Gulf R. R. Co., with which it became amalgamated and identified. Its separate existence pro tanto became merged in the latter company. How far it can ever be galvanized into new life for the purpose of the extension of the road from Thomasville to the Florida line, it is not necessary to inquire. That question has nothing to do with the one now in hand.

The only remaining question is whether the deed of trust or mortgage given by the Atlantic and Gulf R. R. Co. to the complainant and his co-trustee covers the railroad in question. In terms it covers and pledges the entire railroad of the Atlantic and Gulf R. R. Co. in Georgia, constructed, or to be constructed, from Savannah to Bainbridge, or to and from any other points in the State of Georgia, with its appurtenances, with all rights of way acquired, or thereafter to be acquired or obtained, and all rolling stock and machinery acquired or to be thereafter acquired, and all franchises, rights, and privileges connected with or relating to said railroad, or the construction, maintenance, or use thereof. Under the settled rule in regard to the operation of railroad mortgages on

after-acquired property, where the terms of the instrument extend to such property, there can be no question that the mortgage in this case did extend to and cover any portion of road belonging to the company and authorized by its charter, which was constructed after the mortgage was given. The only question here is whether the railroad from Thomasville to Albany is fairly within this category. We have already seen that the company had the power to construct this line; that it was within its chartered limits. There can be no doubt, therefore, that if the road had been constructed by the company without any reference to the South Georgia and Florida R. R. Co., it would have fallen directly within the operation of the rule in question. Instead of constructing it directly, the Atlantic and Gulf R. R. Co. procured its construction through, and by arrangement with and purchase from, the South Georgia and Florida Co. Can this make any difference? When constructed, the road became part of the system of roads of the Atlantic and Gulf R. R. Co., as much so as if it had constructed it independently. A road purchased as and for a part of its chartered line is no less a part of its proper road than one built for that purpose. Provision was made, it is true, in the contract between the companies, for a prior lien in favor of the mortgages separately placed upon the road thus acquired. That lien is conceded to be valid and binding. But, subject thereto, the mortgage given to the complainant properly extends to and covers this road as part of the entire line of the company. It is embraced in the terms of the mortgage, and is in law subject to its operation. It is part of the lawfully-acquired property of the Atlantic and Gulf R. R. Co.—acquired under its chartered rights and powers. It is the property of no other company. It is subject to the debts of no other company, except those which attached to it by virtue of the superior mortgage liens before mentioned. The appellants, as stockholders of the company, equally with the company itself, are bound by the mortgage. Their claims are inferior and subject to it. Their position as general creditors, in regard to any interest due them, is equally inferior. They have no equity that can prevail against it.

The appellants have suggested several subsidiary points which, regard being had to the views we have already expressed, cannot affect the result. One point is that the charter of the South Georgia and Florida R. R. Co. expired in 1872, before the execution of the final deed to the Atlantic and Gulf R. R. Co. We do not understand that the charter expired at that time, but only that the time limited for the construction of the road expired. If the charter expired, how did the company become a party to this suit? But even if the charter did expire, the road was finished and in the possession of the Atlantic and Gulf R. R. Co. in 1870, and the entire transaction was then completed. The conveyance executed in 1876 was merely carrying out in form what was already com-

pleted and carried out in substance. But how can this objection avail the appellants in any view of the case? What right have they to object to the conveyance? Its only purpose was to carry out what they and all the parties concerned consented to and acquiesced in long before. And in their position, as stockholders of the Atlantic and Gulf R. R. Co., it does not lie in their mouths to object that the South Georgia and Florida R. R. Co. unlawfully exercised corporate powers when it completed the performance of its obligation to the Atlantic and Gulf R. R. Co.

But it is unnecessary to pursue the subject further. We see nothing in the points raised on the appeal to invalidate the decree of the Circuit Court. The decree is, therefore, affirmed.

CITY OF SAVANNAH

v.

JESUP, surviving Trustee, and another.

(*Advances Case, U. S. Supreme Court. January 15, 1883.*)

Where a foreclosure suit was brought, and the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon, *held*, that the order of the Circuit Court rejecting such claim is binding upon the corporation, and where the amount of taxes is sufficient to give this court jurisdiction, the corporation is entitled to an appeal.

Certain taxes assessed by the city of Savannah, for the years 1877 and 1878, upon lands situate within its limits, and belonging to the Atlantic and Gulf R. R. Co., *held* to be unauthorized by law.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

A. R. Lawton, for appellant.

W. S. Chisholm, for appellees.

HARLAN, J.—In *State of Georgia v. Jesup*, ante, 363, will be found a brief statement of the history of a suit commenced on the fifteenth day of February, 1877, in the Circuit Court of the United States for the Southern District of Georgia, by Morris K. Jesup, surviving trustee, etc., against the Atlantic and Gulf R. R. Co., a Georgia corporation, for the foreclosure of certain mortgages, covering the main line and branches of that company, with their respective appurtenances, rolling stock, equipment, etc. In addition to the facts there stated, it may be added that on the tenth day of April, 1879—the mortgaged property being then, as it had been since February 20th, 1879, in the actual possession of receivers—the city of Savannah, a municipal corporation of Georgia, by leave of

court, filed in said cause its petition *pro interesse suo*. It was therein alleged that the city was a creditor of the railroad company, in this: that the latter was indebted to the city for taxes "upon real estate owned and used for its legitimate corporate purposes," within the corporate limits of Savannah, in the sum of \$2853.75 for the year 1877, and \$3720 for the year 1878; and that for those sums execution had duly issued on the twentieth day of January, 1877, and March 1, 1879, respectively, and were then in the hands of the city marshal to be levied on the goods, chattels, lands, and tenements of the railroad company. The prayer of the city was that it be heard in its own interest; that the court would authorize it to proceed in the collection of said taxes by levy and sale, under its ordinances and the laws of the State, else order the receivers to pay such taxes out of the funds and property in their possession, or give such other and immediate relief in the premises as to the court seemed proper.

This intervening petition, having been submitted and considered upon the merits, was, by order of the court, dismissed. Subsequently, the main cause was heard upon bills and answers, and the various interventions filed, and a final decree rendered, in which, among other things, it was recited that various persons had intervened for their interest, claiming to have liens against the property of the company as laborers, mechanics, or material-men, or claiming to have an equity to be paid out of moneys in the hands of the receivers before payment of the bonds secured by the mortgages. By the decree it was, among other things, ordered and adjudged that certain claims of laborers and mechanics were superior liens on the mortgaged property and its proceeds, but that the claims of those who have furnished material only, but not as laborers or mechanics, although entitled to liens therefor, be postponed to the mortgages therein mentioned, "and no allowance is made, or to be paid, from the proceeds of said property, or from the money in the receivers' hands, to any other persons than to those who have such liens as aforesaid."

The city of Savannah prayed, and was allowed, an appeal—the one now before the court—from the decree denying its claim for taxes for the years 1877 and 1878.

Upon the oral argument in this court, some question arose as to whether the present appeal brings before us for review the merits of these claims for taxes. We are of opinion that this question must receive an affirmative answer. If the city had a valid claim for taxes, paramount to the lien created by the mortgages, two courses were open to it—to postpone action under its executions until the proceedings in the Circuit Court of the United States were concluded, and its possession of the property, by receivers, had ended; or, with leave of court, to file a petition *pro interesse suo*, submitting its claims for judicial determination. It adopted the

latter course, and, in so doing, put itself in a condition to appeal from any order adverse to its interests, if such order involved an amount sufficient to give this court jurisdiction. This practice received the sanction of this court in *Wiswall v. Sampson*, 14 How. 65. The order dismissing the city's petition was followed by a final decree, which, in terms, limited the distribution of the proceeds of sale to certain claimants (the city not among the number), excluding all others. The orders in the court below, therefore, constituted, in every essential sense, a judicial determination adverse to the city's claims for taxes. Until those orders are reversed or modified, the city is concluded against any further assertion of its rights in the premises. Consequently, the appeal from the decree dismissing the petition and denying the claims for taxes, brings before us the question whether those claims were valid and enforceable against the property of the railroad company, or the proceeds arising from any sale thereof. That question we proceed to examine.

In conformity with an act of the legislature of Georgia, passed April 18th, 1863, the Atlantic and Gulf R. R. Co. was formed by the consolidation of two other companies—one, the Savannah, Albany and Gulf R. R. Co., incorporated December 25th, 1847; and the other, the Atlantic and Gulf R. R. Co., incorporated February 27th, 1856. The two constituent companies acquired, by their respective charters, an immunity from all taxation in excess of one half of one per cent upon its annual net income, or the annual net proceeds of its investments—whether the one or the other is not material in the present case. This immunity passed to the consolidated company, subject, however, to the right of the State, reserved in the Code of Georgia (which was in force on and after January 1st, 1863), to withdraw it altogether. In *Railroad Co. v. Georgia*, 98 U. S. 365, we held that this immunity or limited exemption was, in law, withdrawn by the State in the act of February 28th, 1874, entitled "An act to amend the tax laws of the State so far as the same relate to railroad companies, and to define the liabilities of said companies to taxation, and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act." As the present case turns mainly upon the construction and effect of that act, it is necessary to examine its provisions with some care.

By the first section it is enacted that from and after the passage of the act "the presidents of all the railroad companies in this State shall be required to return on oath, annually, to the comptroller general the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regu-

lations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the comptroller general." The second section provides that the presidents of railroad companies shall "pay to the comptroller general the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the comptroller general shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against incorporated companies hereinbefore mentioned." The third section provides that if any railroad company affected by the first and second sections of the act "desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the first section of this act, and after paying the tax levied on such corporation by the tax act for 1873, and continuing to pay the same while the question of its liability under this act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the comptroller general aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality on the part of the comptroller general and of said corporation, in which cases the comptroller general shall be represented by the attorney general of the State or such other attorney as the governor may select, and if the grounds of such illegality be not sustained, the comptroller general shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the act, and if at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax fi. fa. issued by the comptroller general." The remaining section does nothing more than repeal all conflicting laws. In *Railroad Co. v. Georgia*, supra, the constitutional validity of that act was sustained.

The effect, then, of the act of 1874 was that whereas, prior to its passage, the railroad company enjoyed immunity from all taxation, except at a limited rate upon its annual net income, or annual net proceeds of its investments, by that statute each class or species of its property, without exception, was thenceforward liable, without deducting the indebtedness of the company, "to be taxed

as other property of the people of the State." Now, the argument of learned counsel is that by its charter the city had "full power and authority to make such assessments and lay such taxes on the inhabitants of said city, and those who have taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said city;" and that, "besides real and personal property, the said mayor and aldermen may tax capital invested in said city, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling, dividends, bank, insurance, express, or other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law or competent authority of the United States." Code of Georgia, § 4847. Consequently, it is argued, when the act of 1874 withdrew the immunity theretofore enjoyed by the company, and declared that its property should "be taxed as other property of the people of the State," such of the property of the company, within the city, as was taxable under its charter, could be thereafter reached for all purposes of municipal taxation.

This argument, at first blush, would seem to have some force; but we are of opinion that the opposing view is more consistent with the language of the statute of 1874, and the policy which seems to have dictated its enactment. Upon its face that act appears to establish a system of taxation, by the State, for its benefit exclusively, of the property of railroad companies. The returns by the companies are required to be made to the comptroller general, under the same regulations prescribed for returns to him by other incorporated companies. The taxes assessed are to be paid to that officer, and upon him, as representing the State, and upon no other officer, is imposed the duty of enforcing their collection. In the event of litigation he is to be represented by the attorney general of the State, or by such other attorney as the governor may select. The statute, thus imposing, in behalf of the State, taxes to be collected by its officer, and to be paid, when collected, into its treasury, provides no machinery by means of which the property of railroad companies may be taxed by municipal corporations for local purposes. No provision is made for taxation by the municipal authorities of counties, cities, and towns, through which the road passes, of such portion of the company's property as was within their respective limits. Nor is any provision made for the transmission by the comptroller general to such local authorities of the returns made to him by railroad companies of their property for taxation. Had the statute done nothing more, in the cases of railroad companies whose charters were subject to legislative repeal or modification, than to withdraw the immunity from taxation theretofore enjoyed by them, there would be more force in the

position taken by the city of Savannah. But such is not the case; for, in the same act requiring taxation, for the benefit of the State, of all the property of railroad companies, and which, therefore, operated as a withdrawal of the then existing right of limited exemption from taxation, the legislature makes the returns to the comptroller general by the railroad companies of their property the only basis of the taxation to which, by its provisions, they are to be thereafter subjected. The mode prescribed by the statute for the payment of taxes by railroad companies has reference exclusively to taxes to be paid to the State, and not to municipal corporations. It seems to the court that the legislature did not intend, when imposing, as was done by the statute of 1874, taxation for the State upon all the property of railroad companies, to put upon the same property the additional burden of municipal taxation which, had not that act been passed, would have been forbidden by the charters of those companies. The city relies upon that statute as opening the door for municipal taxation upon all the property of the railroad company which was taxable under any law of the State. But as the State simply substituted, for taxation to a limited amount, taxation for the benefit of the State upon all the property of the company according to its value, we do not think that the railroad company could be subjected to additional taxation upon the part of the city of Savannah without further legislation to that end.

Counsel have called attention to *Bailey v. Magwire*, 22 Wall. 216, and insist that the principles there announced, if applied in this case, will lead to a conclusion different from that indicated. We do not so understand that case, and do not assent to any such interpretation of the decision there rendered. In that case it appeared that the Pacific Railroad Company, a Missouri corporation, was granted an exemption from taxation for a limited period. When, as well as before, that immunity was granted, the property of the company was liable for county, school, and municipal taxes, under the public laws of the State providing a general scheme for the taxation of all property. It was decided that there was nothing in the language of the statute, giving the exemption for a fixed term of years, which justified the conclusion that the State intended to relieve the property of the railroad company, after the exemption ceased, from the same liability for municipal taxes to which it was subject, by the general tax laws of the State, at the time that exemption was granted. The essential difference between that case and this is that the Atlantic and Gulf Railroad Company was, from its organization, exempted from all taxation, in excess of a limited amount, and, simultaneously with the withdrawal of that immunity, the State provided for the taxation of all of its property for the benefit of the State. Here it is not claimed that the property of the company was taxable by the city of Savannah during the period of limited exemp-

tion, withdrawn by the act of 1874, and for which exemption was substituted taxation, for the benefit of the State, of all of its property.

But it is contended that the taxes for the year 1878 stand upon a different footing from those in 1877; that is, that the city is entitled to collect the former, even if the law be otherwise as to the latter. This position rests upon that part of the constitution of Georgia (which went into effect December 21st, 1877) declaring that "all laws exempting property from taxation, other than the property herein enumerated, [which does not embrace the property of railroad corporations,] shall be void." We are unable to perceive how, in the view expressed as to the scope and effect of the act of 1874, that constitutional provision can have any bearing upon the present case. The act of 1874, as was ruled in *Railroad Co. v. Georgia*, took away the immunity of limited taxation previously enjoyed by the Atlantic and Gulf Railroad Company under its charter, and substituted another mode of taxation, for the benefit of the State, covering all the property of that company. The act of 1874 contained no exemption, and it was, therefore, unaffected by a constitutional provision declaring laws to be void which exempted property, other than that specially enumerated, from taxation.

For the reasons given we are of opinion that the decree below was right and should be affirmed. It is so ordered.

MILLER, J., dissenting.—I do not agree to the construction which the court places upon the act of the State of Georgia subjecting the railroad company to taxation. When that statute says that the property of the railroad company is "to be taxed as other property of the people of the State," I understand it to mean that it is to be subjected to all the lawful taxes imposed by State laws under the same circumstances that the property of the citizen is. The case of *Bailey v. Magwire*, 22 Wall. 215, construes a statute of Missouri, passed under similar circumstances and in language almost identical, to have this meaning. That the statute of Georgia only provides in that act for the means of collecting the taxes due the State, affords no argument against taxation by counties and cities for local purposes, because the laws already in existence were sufficient for that purpose.

TURNER and another

v.

FARMERS' LOAN AND TRUST Co. and others.

(Advance Case, U. S. Supreme Court. January 15, 1883.)

In a suit for foreclosure, commenced in a State court, and removed to the Circuit Court of the United States, a motion to remand the cause was made and overruled. Subsequently, a final decree of sale was passed. Upon appeal merely from the order confirming the sale, the final decree not disclosing, affirmatively, a want of jurisdiction, this court will not examine the record, prior to such final decree, to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different States; but, assuming that the final decree was within the power of the Circuit Court to render, will only examine the decree to ascertain whether the sale was had in conformity with its provisions.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

N. A. Cowdry and Geo. W. Kretzinger, for appellants.

Jas. D. Campbell, for appellees.

HARLAN, J.—This suit was commenced on the twenty-first day of November, 1874, in the Circuit Court for De Witt county, Illinois, by Malcolm C. Turner, James Turner, and others, constituting the firm of Turner Bros., against the Indianapolis, Bloomington and Western Railway Company, the Farmers' Loan and Trust Company, and others. The complainants, suing in behalf of themselves and all other bondholders and creditors of the railway company, asked a decree for the foreclosure of several mortgages, covering as well its property and franchises as the road and franchises of the constituent companies, by whose consolidation it was created. The Farmers' Loan and Trust Company appeared and answered. It also filed a cross-bill, making all necessary parties defendant thereto; and, as trustee in some of the mortgages creating prior liens upon the main line of the consolidated road, it prayed for a decree of foreclosure, a sale of the mortgaged property, and a proper distribution of the proceeds arising therefrom among the several classes of creditors of the railway company. Subsequently, on the twenty-sixth of April, 1876, it filed a petition, accompanied by a sufficient bond, for the removal of the suit into the Circuit Court of the United States for the Southern District of Illinois; and thereafter, it is asserted, the State court proceeded no further. A transcript of the proceedings having been filed in the Circuit Court of the United States, a motion was there made to remand the cause, while the Farmers' Loan and Trust Company moved that the court take

jurisdiction. By an order entered on the nineteenth day of July, 1876, the former motion was denied and the latter sustained.

On the eighteenth day of July, 1877, a final decree was passed, ascertaining the amounts due and unpaid on the mortgages to the Farmers' Loan and Trust Company. By that decree it was ordered and adjudged that the railway company, within twenty days thereafter, pay the trustee the amount so ascertained (\$6,234,625), with interest from the date of the decree; that in default of such payment the equity of all the defendants to the cross-bill, in the mortgaged property, be forever barred and foreclosed, and the property—which included all the rights, effects, and franchises of the consolidated company, and of its constituent companies, as to the main line of road—be sold as an entirety, the same being, in the opinion and judgment of the court, incapable of sale separately or in division without material injury to its value. It was further decreed that the mortgaged property be sold without appraisement and without reference, and not subject to any law of Illinois or Indiana conferring the right of redemption from mortgage sales. On the eighth day of May, 1878, the original decree was amended by way of further direction for its execution. The sale occurred on the thirtieth day of October, 1878, was reported to court on the succeeding day, and on the first day of November, 1878, exceptions thereto were filed by James Turner and the railway company. On the twenty-third of December, 1878, the exceptions were overruled, and an order entered confirming and approving the sale in all respects. On the third day of February, 1879, Turner and the railway company filed their joint petition, praying an appeal from the final order confirming the sale. The appeal was allowed, and the bond tendered was approved, not to operate as a supersedeas. Subsequently the purchaser received a deed and took possession of the property under the direction of the court. It may be stated that a similar decree was entered in the Circuit Court of the United States for the district of Indiana, in a suit pending therein between, substantially, the same parties and relating to the same property. That suit was commenced on the eighteenth day of November, 1874, in the Circuit Court for Montgomery county, Indiana, and thence removed into the federal court upon the petition of the Farmers' Loan and Trust Company.

Notwithstanding the record is very voluminous, it is believed that this statement is sufficient to indicate the grounds upon which this court rests its determination of the case.

Numerous errors have been assigned in behalf of the appellants, James Turner and the Indianapolis, Bloomington and Western Ry. Co. The first and most important one relates to the jurisdiction of the Circuit Court of the United States. Their contention is that under the act of March 3, 1875, the State court could not have been deprived of jurisdiction to proceed, unless the petition for re-

removal was filed "before or at the term at which such cause could be first tried and before the trial thereof;" that the petition of the Farmers' Loan and Trust Co. was not so filed; consequently, it is insisted, jurisdiction in the federal court could not have attached. It is further argued that the pleadings disclose the fact that there was no such controversy in this suit, between citizens of different States, as would authorize its removal from the State court under the act of March 3d, 1875, or under that of March 2d, 1867, even if the latter is in force for any purpose.

Without admitting the soundness of these propositions, we are of opinion that the questions of jurisdiction now raised cannot be determined upon an appeal merely from the order confirming the report of sale. Whether the suit was one which the Farmers' Loan and Trust Co. was entitled to have removed—that is, whether the Circuit Court of the United States could rightfully proceed after the petition for removal, accompanied by a sufficient bond, had been filed in the State court,—was a question directly presented to that court for judicial determination upon the motion that the cause be remanded. The denial of that motion constituted an adjudication by the federal court that the facts existed which were necessary to give jurisdiction. And had the question not been thus formally presented, it was the duty of the Circuit Court to dismiss or remand the cause, as justice might have required, at any time during its progress, when it appeared that the suit did not really or substantially involve a dispute or controversy properly within its jurisdiction. Act of March 3, 1875, § 5; *Williams v. Nottawa*, 104 U. S. 209.

Further, the final decree necessarily involved, and was itself, a judicial determination, as between the parties, that the suit was one of which that court might take cognizance. That decree, unmodified and unchallenged by any direct appeal therefrom, should, upon this appeal only from the order confirming the sale, be deemed conclusive, between the parties and their privies, as to all matters in issue and by it adjudicated, including the questions of jurisdiction now pressed upon our attention. Such, we think, must be the rule, especially under existing statutes regulating the jurisdiction of the courts of the United States. Whether or not a cause, commenced in a State court, could have been tried at some term thereof prior to the filing of a petition for removal; whether the parties to a particular suit, without regard to their position as plaintiffs or defendants, can be so arranged on different sides of the controversy as to make a proper case for removal upon the ground of citizenship (*Removal Cases*, 100 U. S. 457); whether there is in the suit a separable controversy between citizens of different States to which the judicial power of the United States extends,—are often questions difficult of solution. We have held in numerous cases that upon the filing of a petition and bond for removal

in the State court, the suit being removable under the statute, its jurisdiction ceases. And to the end that litigants may not, in such cases, be harassed by doubts as to which court has authority to proceed, the party, against whom the removal is had, is at liberty to move that the suit be remanded; and the act of 1875, for the first time in the legislation of Congress, declares that an order of the Circuit Court remanding a cause may, in advance of the final judgment or decree therein, be reviewed by this court on writ of error or appeal, as the case may require the one or the other mode to be pursued. Prior to that act the remedy, in that class of cases, was by mandamus to compel the Circuit Court to hear and determine the cause. *Babbitt v. Clark*, 103 U. S. 606; *R. R. Co. v. Wiswall*, 23 Wall. 507; *Ins. Co. v. Comstock*, 16 Wall. 258.

When the Circuit Court assumes jurisdiction of the cause, the party denying its authority to do so may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose. *R. R. Co. v. Koontz*, 104 U. S. 15. In the present case we have seen that the appeal is only from the order confirming the sale. Appellants elected not to appeal from the final decree, although it necessarily involved every question affecting the jurisdiction of the Circuit Court. The decree is, consequently, not before us for any purpose, except to ascertain, from an inspection thereof, whether the sale was conducted in conformity with its provisions. In such cases, upon an appeal, not from the final decree, but only from an order in execution thereof, the court will not examine the record, prior to such decree, to see whether the petition for removal was filed in due time, or whether it makes a case of federal jurisdiction, by reason of the presence in the suit of a controversy between citizens of different States, but will assume that the final decree, being passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to subject-matter or parties, was within the power of the court to render. Whether the order confirming the sale would have been erroneous, had the decree itself disclosed, affirmatively, a want of jurisdiction, is a question which need not be decided.

What we have said disposes of numerous other assignments of error, such as that the court erred in decreeing that the property of the railroad company be sold without appraisement and without reference, and not subject to the laws of Illinois and Indiana conferring the right of redemption from sales of mortgaged real estate; in ordering the railroad and other property to be sold without first ascertaining what claims existed which were prior in lien to the mortgages foreclosed; in amending the decree of September, 1877, after the expiration of the term at which it was entered; in ordering the cross-bill of the Farmers' Loan and Trust Co. to be taken by default as against the complainants in the original bill, after it

appeared that they had become bankrupts, and their property and rights had passed to an assignee in bankruptcy, who was not made a party to the cause; in decreeing the personal property to the railroad company to be sold, and in subsequently delivering it to the purchasers, in disregard of the alleged rights of appellants under the chattel mortgage executed to Thomas on the sixteenth day of November, 1874; in refusing to entertain appellant Turner's petition to intervene, filed on the day of sale; and in directing a foreclosure and sale of the property for the principal and interest of the debt secured by the mortgage, when, as is claimed, it did not appear that the principal had become due.

We do not stop to consider whether these objections find any support in the record, since it is sufficient to say that, if any such errors exist, they necessarily inhere, some in the final decree of foreclosure and sale, and others in the orders which preceded it. They cannot be examined upon an appeal merely from the order confirming the report of sale. Our authority extends, as we have shown, no further than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken. And some of these exceptions plainly have reference, not to the sale itself, but to the final decree of foreclosure; such, for instance, as that the terms of sale were too onerous; that the property was sold subject to various claims, the amount of which was wholly uncertain; and that the court had no jurisdiction in the case. The only exceptions which properly relate to the sale are that the price at which the property was struck off and sold—\$1,000,000—was inadequate and insufficient; and that the property was not advertised for a sufficient length of time. It is enough to say that the record discloses no ground upon which these exceptions could have been sustained. One exception was to the effect that the purchasers at the sale constituted a committee, acting as agents of bondholders of the railway company, and that the report of sale did not disclose the names of the principals for whose use the property was purchased, or the amount to which each of said parties was beneficially interested. We are unable to perceive anything of substance in this exception. Since the sale was, in all material respects, in conformity with the final decree, from which no appeal was prayed, and since the record discloses no ground upon which its fairness can be impeached, the court below properly overruled the exceptions and confirmed the sale. The order appealed from must, consequently, be affirmed. It is so ordered.

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THE SYRACUSE SAVINGS BANK

v.

THE SYRACUSE, CHENANGO AND NEW YORK R. R. Co.

(88 *New York Reports*, 110.)

The General Term of the Supreme Court, except as limited by statute, has all the power and all the general jurisdiction of the Supreme Court.

Said General Term has the power to attach any conditions it sees fit to the affirmance of an order of Special Term, when the vacating or affirmance of the order is within its discretion.

In an action brought under the Revised Statutes (2 R. S. 463, §§ 36, 37) against a railroad corporation by a judgment creditor to sequester its assets, etc., a receiver was appointed, who, upon motion of stockholders holding a minority of the stock, without notice to the others, was ordered to sell the property and franchises of the company. Thereafter a motion was made by stockholders holding a majority of the stock, on notice to the receiver and those stockholders who made the former application, for an order vacating the order of sale; this motion was denied. On appeal to the General Term the order denying the motion was affirmed, but a stay of proceedings under the order of sale was granted until the further order of the court, without prejudice to a new application to vacate said order of sale. On appeal from so much of the General Term order as granted the stay, and stated that the affirmance was without prejudice, *held*, that the portion of the order appealed from was within the discretion of the court below, and was not reviewable here; that as it appeared that the appellants were a minority of the stockholders, and that the stock was absolutely worthless as such, and it did not appear that any creditors asked for the sale, also it appearing that efforts were being made by the majority to utilize the road, there were facts sufficient before the court, upon which it could exercise its jurisdiction.

(Argued January 31, 1882; decided February 28, 1882.)

APPEAL by certain stockholders of the defendant, from a portion of an order of the General Term of the Supreme Court, in the fourth judicial department, made October 28, 1881.

The order of General Term, the portion appealed from, and the material facts are set forth in the opinion.

Geo. F. Comstock for appellants: The appointment of the receiver was a final order and operated as a virtual dissolution of the corporation. (2 R. S. 463, art. 2, tit. 4, chap. 8, pt. 3, §§ 36, 37; *Verplanck v. Ins. Co.*, 2 Paige, 348, 352; *Mann v. Pentz*, 3 N. Y. 415; 4 Paige, 225; 6 id. 503; 9 id. 15; 10 id. 382; *Curtis v. Leavitt*, 15 N. Y. 43; *Gillet v. Moody*, 3 id. 479; *Edwards on Receivers*, 5, 247, 273, 274; *Van Wagenen v. Clark*, 22 Hun, 497; *Slee v. Bloom*, 19 Johns. 458.) The order appealed from involved a substantial right and did not rest in discretion, and was appealable. (*Howard v. Mills*, 53 N. Y. 322; *People v. City of Syracuse*, 78 id. 56, 61.) The receivership was a statutory and final trust, and the provisions of the statutes required the performance

of the trust. (*Edwards on Receivers*, 247; 2 R. S. 463, §§ 36, 37; id. 367-369; *Ferry v. Central B'k*, 15 How. Pr. 445; *Mann v. Pentz*, 36 N. Y. 415; *Huguenot B'k v. Studwell*, 74 id. 62; *Van Wagenen v. Clark*, 22 Hun, 497; 38 N. Y. 178; 69 id. 470.)

E. W. Page for respondent: Neither provision of the order appealed from is appealable, both being discretionary with the Supreme Court. (*Miannay v. Blogg*, 41 N. Y. 521; *Benley v. Waterman*, 78 id. 623; *People v. Northern R. R. Co.*, 42 id. 217, 231-2; *Enos v. Thomas and Hunter*, 5 How. Pr. 359.) Since the act of 1870 (chap. 151), prohibiting the appointment of a receiver except in a civil action, any receiver appointed in advance of a judgment in the action can be but a temporary receiver. (*Kincade v. Dwinelle*, 59 N. Y. 548, 552; *Perry v. Bank of Central New York*, 15 How. Pr. 445, 459; affirmed, 9 Abb. Pr. 101; *Angel v. Silsbury*, 19 How. Pr. 48, 50.) The temporary stay is discretionary. (*People v. Northern R. R. Co.*, 42 N. Y. 217, 231-2; *Enos v. Thomas et al.*, 5 How. Pr. 359; *Miannay v. Blogg*, 41 N. Y. 521.) The whole matter of the appointment of temporary receivers, whether and when they shall sell, and of the control over their sales, is discretionary with the Supreme Court. The receiver is merely the creature of the court. (*Turner v. Crichton*, 53 N. Y. 641; *Fellows v. Hermans*, 13 Abb. [N. S.] 1; *Verplanck v. Caines*, 1 Johns. Ch. 57; *Crane v. Stiger*, 58 N. Y. 625; *Hale v. Clauson*, 60 id. 339; 2 *Daniell's Ch. Pr.* 1715-16; *Chapman v. Hammersley*, 4 W. R. 173; *Wardell v. Leavenworth*, 3 Edw. Ch. 244; *Crane v. Ford*, *Hopk.* 114.)

EARL, J.—In 1878 the plaintiff recovered a judgment against the defendant for upwards of \$7000. An execution was issued upon that judgment and returned unsatisfied. Thereafter an action was commenced (under 2 R. S. 463, §§ 36 and 37) to sequester the stock and property, things in action and effects of the defendant, and for the appointment of a receiver; and a receiver was appointed on the 3d day of January, 1879. The assets of the corporation consisted mainly of its road and rolling stock. The amount of its capital was \$801,400, divided into common and preferred stock, as follows: \$301,400 par value preferred stock and \$500,000 par value common stock, and there was a mortgage upon the road and its franchises to secure bonds of the par value of \$261,400. The receiver, after his appointment, took possession of the road and continued to operate it, and was able to pay, as I infer from the papers submitted to us, simply the operating expenses. The road had been unable to pay the interest upon its bonds, or to earn any money out of which to pay dividends to its stockholders of either class. In April, 1881, George F. Comstock and others, the appellants upon this appeal, owned \$209,980 par value of the common stock and \$7230 par value of the preferred stock, and the

respondents upon this appeal owned or represented \$250,490 par value of the preferred stock and \$254,730 par value of the common stock, and they held a large amount of overdue interest coupons upon the bonds of the company. At a term of the Supreme Court held at Herkimer on the 14th day of April, 1881, upon the motion of the present appellants, notice of which was not given to any of the respondents, an order was made directing the receiver to proceed and sell the railroad property and franchises of the corporation. In May thereafter a motion was made by the respondents at the Special Term of the Supreme Court, held at Oswego, upon notice given to the appellants and to the receiver, for an order vacating the prior order for a sale, and that motion was denied. These respondents appealed from that order to the General Term, and there the order appealed from was affirmed, and a stay of proceedings under the order directing the sale was granted until the further order of the court, without prejudice to a new application to vacate the order of sale. From so much of the General Term order as granted the stay and stated that the affirmance was without prejudice to a new application, the respondents in the Supreme Court appealed to this court, and upon the argument before us their counsel contended that that portion of the order is appealable to this court, as it affected a substantial right not resting in the discretion of the court. On the other hand, the respondents in this court contended that the order is not appealable, inasmuch as it rested in the discretion of the Supreme Court, and we are of that opinion.

The receiver when appointed was an officer of the court appointing him, bound to obey its directions and subject in the general discharge of his duties to its control. It could direct and control him as to the time when and the place where and the manner in which the sale should be made, and as to the terms thereof. The Special Term at Herkimer, without hearing these respondents who owned or represented a majority of both the preferred and common stock, and who owned or represented a considerable portion of the indebtedness of the company, not upon the application of any creditor, but upon the application of a minority of the stockholders, made an order directing the sale. It is not disputed that it was perfectly competent for the court in the exercise of its discretion to make that order. In view of all the circumstances disclosed in the affidavits and papers submitted it might have refused the order, or might have postponed making it until all the parties could be brought in and heard in reference to it. It was perfectly competent for the subsequent Special Term held at Oswego to vacate or modify that order, and when the case came to the General Term upon appeal it possessed the same discretionary power as was possessed by the Special Term. In the exercise of its discretion, in view of all the facts disclosed to it, it could have reversed the

order denying the motion to vacate or modified the order directing the sale, and if it had done so its discretion would not have been reviewable by this court.

When the matter was pending before the General Term the present appellants did not have the absolute right that the railroad property should then without delay be sold by the receiver. In view of all the facts disclosed, that the appellants were a minority of the stockholders, representing no debts against the company; that there were no creditors asking for the sale of the property; that the stock, both common and preferred, was absolutely worthless as stock in a living existing corporation; in view of the business, financial and commercial conditions of the country, and the efforts that were being made by the respondents and those represented by them to utilize this railroad by bringing it into a system of railroads to be inaugurated by them, it cannot be said that there were no facts before the court upon which it could exercise its discretion in granting an order even absolutely vacating the order of sale.

As the General Term had thus the power in the exercise of its discretion to absolutely vacate the order of sale, or to modify it, it could attach any conditions it saw fit to the affirmance of the order appealed from, and hence could grant the stay and give leave to renew the application to vacate the order of sale.

It cannot be doubted that a Special Term upon motion could, at any time prior to the appeal to the General Term, have granted the same stay which was granted at the General Term. And it cannot be doubted that the Special Term, upon motion, could have given leave to these respondents to renew their motion to vacate the order of sale, and the General Term had the same power. The Supreme Court is one court exercising its jurisdiction through the Special Terms, the Circuits and the General Terms. And the General Term, except as limited by the laws, has all the power and all the general jurisdiction of the Supreme Court. (*Folger v. Fitzhugh*, 41 N. Y. 228; *Tracy v. Talmadge*, 1 Abb. Pr. 460, 463; *Gracie v. Freeland*, 1 N. Y. 228, 233; *Anonymous v. Anonymous*, 10 How. Pr. 353; In the Matter of the Commissioners of Central Park, 61 Barb. 40, 47.) Our attention is called to no provision of law which prohibits the General Term from exercising the jurisdiction here complained of. In *Gray v. The New York Floating Elevator Co.* (Feb. 10th, 1882), recently decided in this court—a common-law action—the plaintiff appealed from so much of the order of the General Term as stated that the affirmance was “without prejudice to a motion to be made on a case at Special Term for a new trial on the question of fact,” and we dismissed the appeal on the ground that the General Term in the exercise of its discretion could thus qualify its order of affirmance. In *Genet v. The President, etc., of the Del. and Hudson Canal Co.* (86 N. Y.

[Mem.] 625), recently decided in this court—an equity action—the complaint was dismissed at the Special Term, and upon appeal to the General Term it was affirmed “without prejudice to any other action or proceeding which the plaintiff may be advised to institute.” The defendant appealed to this court from the portion of the order which is quoted, and we again held that the General Term had jurisdiction thus to qualify its order of affirmance.

It matters not that these appellants made, in the papers submitted to us, a very strong case for the sale of the railroad and its property by the receiver. Their right to a sale was not denied. The sale was simply stayed until the further order of the court.

The order of sale and the subsequent order refusing to vacate the order of sale constitute no bar to a further application to vacate the order of sale. Such an application could have been made to the Special Term without the leave of the General Term, and that portion of the General Term order, stating that its affirmance was without prejudice to a new application, is absolutely of no effect in conferring any new power upon a judge sitting at Special Term of the same court. The principle of *res adjudicata* does not in such a case apply to prevent a new application to the Special Term.

There is much discussion in the briefs submitted to us upon the question whether the receivership was final and permanent, or merely temporary. We have not deemed the determination of this question of any importance at this time, so it has no bearing whatever upon the decision which we make.

Therefore, when the General Term had this matter before it, and after hearing the parties, it undoubtedly had the power to grant the stay and to reserve the right for a new application which is now complained of. In the exercise of this power it did not affect a substantial right of these appellants which did not rest in its discretion. The exercise of its discretion in the matter could be based upon facts appearing in the record now before us, or upon facts otherwise within its knowledge or brought to its attention upon the argument.

We are, therefore, of opinion that the appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY.

(36 *New Jersey Eq. Reports*, 5. Oct. Term, 1882.)

The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval. *Held*—

That the proposed purchase was ultra vires, and hence could not be executed even if ratified by the stockholders.

That it was void and against public policy, in that its object was to prevent lawful competition.

That it could be enjoined upon the application of a single stockholder of the purchasing company, and that the fact that such stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, would not affect his right to relief.

BILL for injunction. On motion to dissolve the injunction on bill and answer.

Mr. P. L. Voorhees and Mr. B. Williamson, for the motion.

Mr. D. J. Pancoast, Mr. S. H. Grey and Mr. T. N. McCarter, contra.

THE CHANCELLOR.—The bill is filed by William L. Elkins, a stockholder of the Camden and Atlantic Railroad Company, on behalf of himself and the other stockholders, against the company, to restrain it from entering into or executing any agreement with the Philadelphia and Atlantic City Railway Company, for the purchase by the former of the railroad of the latter company, and from entering into or executing any agreement with William Massey for the purchase by it of his interest in the latter company, for the purpose of getting control of the road of that company, and from entering into or executing any agreement with any corporation or corporations, person or persons, for the purchase by it of any of the property or stock of the latter company for any purpose not necessary for the proper operation of its own road. The bill states that it is the purpose of the defendant and its board of directors, in its name and with its funds, either to purchase of the Philadelphia and Atlantic City Railway Company its railroad (which runs, as does that of the defendant, from the city of Camden to Atlantic City), for a very large sum of money, or to purchase of William Massey, who, it alleges, is the owner of the greater part of the stock and property of that company, his interest

therein, for the sum of \$500,000, over and above certain debts and liabilities of that company, estimated to amount to \$200,000, to be assumed and paid by the defendant as a part of the consideration of the purchase; that the terms of the agreement to make the purchase of Massey had already, when the bill was filed, been agreed upon between him and the president of the defendant, and that at a meeting of the board of directors of the defendant, held in Camden, on the 29th of May last, a resolution was passed in favor of the execution of the agreement to purchase from Massey his interest for the before-mentioned consideration. The bill further states that it is the design of the president and board of directors of the defendant to purchase, with the funds and in the name of the defendant, either the entire property of the Philadelphia and Atlantic City Railway Company, or a controlling interest therein, with a view of uniting the property, business and management of that company with those of the defendant; and it charges that the scheme is foreign to the object and purposes of the defendant, beyond its powers, unlawful in its character and against the best interests of its stockholders, and that, if executed, it will result in irreparable injury to the complainant and the other stockholders of the defendant. On the filing of the bill an injunction was issued pursuant to the prayer thereof. The defendant has answered, and now, on the bill and answer, moves to dissolve the injunction. The answer, while it denies that the agreement referred to in the bill is as therein stated, admits that an agreement has been made between the president of the defendant, on its behalf, and Massey, for the sale by the latter to the defendant, for the consideration of \$500,000, to be paid in the defendant's first mortgage bonds, of his stock, bonds and other claims of and against the Philadelphia and Atlantic City Railway Company, and certain rolling stock of his. The following is the property bargained for:

First mortgage bonds.....	\$224,000 00	
Interest unpaid to July 1, 1882, inclusive.....	74,560 00	\$298,560 00
First mortgage bonds, held as collateral security.....	\$70,400 00	
Interest unpaid to July 1, 1882, inclusive.....	27,104 00	\$97,504 00
Floating debt....	\$236,844 10	
Less bonds held as collateral....	70,400 00	\$166,444 10
Interest on the same to July 1, 1882, about.....	27,500 00	
Twenty-six hundred shares of stock.....	180,000 00	
Nine locomotives and twenty-seven cars.....	109,299 47	\$882,807 57

The agreement, according to the answer, was by its terms to be of no effect, unless first submitted to and approved by the defendant's board of directors, and then ratified by its stockholders.

There was also a provision for the purchase of the property by the defendant's president, for himself, or such of the defendant's stockholders as might associate themselves with him or them, in case of the directors or stockholders neglecting or refusing to approve of the agreement. That, however, is of no importance in the decision of the question under consideration. The agreement was made on the 26th of May last, and was to be carried out on the 1st of July following. The answer avers that so far from being an injury to the complainant and the other stockholders of the defendant, the execution of the agreement would be greatly to their advantage, and it avers also that it would be greatly to their advantage if by purchase, lease, uniting or consolidating with the Philadelphia and Atlantic City Railway Company, the defendant could have the management and operation of the railway of that company, and use and operate it as a branch or lateral road. The latter road is a rival road. It is a narrow-gauge road, while the defendant's is of the ordinary gauge. The Philadelphia and Atlantic City Railway Company is insolvent, proceedings for foreclosure and sale of its road under the mortgage (for \$500,000) thereon being now in progress in this court, and the road is now, by leave of this court, in the hands of, and operated by, the trustees for the bondholders under that mortgage. It appears, by the answer, that the defendant's board of directors have approved of the agreement in question, and that they do not intend to take any steps to carry it out, unless it be ratified by the stockholders. But though the answer avers that it is not the intention of the president and directors to act in the matter without the full consent, approval and direction of the stockholders, it must be understood that it does not mean to say that they will not act without the consent of all the stockholders, for otherwise the filing of the bill by the complainant, a dissentient stockholder, would have put an end to the matter, at least until his consent should have been obtained. What it means, undoubtedly, is that they will not act without the consent of the holders of a majority of the stock.

It is quite clear that unless the purchase in question can be sustained as a union or consolidation of the defendant with the other company, it cannot be sustained at all. On its face it is merely the purchase by the defendant, as a speculation, of stock and bonds, and floating debt of an insolvent corporation, together with rolling stock which it cannot use on its own road. In that view it is so obviously foreign to the objects for which the defendant was incorporated, so utterly unauthorized by any law, and so clearly beyond its powers, that no attempt is made in the answer, nor was any made on the argument, to sustain it on that ground; but the effort was made to sustain it on the ground that it is, in effect and in fact, a union and consolidation with the rival company, or an acquisition of the road of that company; as a lateral road. And in-

asmuch as on its face the agreement is neither of those things, it was urged that the court should, if it appears that the proposed purchase is designed merely as means for such union and consolidation or acquisition, have regarded the object and purpose rather than to the means by which they are both effected. By the general railroad law (Rev. p. 930, § 17) and the act of 1880 (P. L. of 1880, p. 231), power is given to railroad companies to lease their roads, or any part of them, to any other corporation or corporations of this or any other state, or to unite and consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies of this or any other state, or to do both; and it is provided that after such lease or consolidation the company acquiring the other's road may use and operate such road, and its own roads, or any of them. The purchase in question here has no reference to the acquisition of the narrow-gauge road by lease. But it is, as before stated, claimed that it is designed to enable the defendant to acquire the control and use of that road. That design is not directly avowed in the answer. It is charged in the bill, however, and is not denied in the answer, and it is a fair inference from the latter, that such and no other is the design. The object to obtain ownership of so great a part of the stock, indebtedness and property of the narrow-gauge company, as to enable the defendant by means thereof to become the purchaser of its property at the foreclosure sale, or to have control of it after such sale in any re-organization of the company. But the acts of the legislature before referred to, while they give the defendant power to unite and consolidate with the other company, give it no power to purchase the debts of that company or its road, and it has no power to borrow money for either of those purposes. Union and consolidation of two railroad companies are one thing, and the purchase by one company of the property and franchises of the other, is another. What the defendant proposes to do is, not to unite and consolidate with the other company, but to purchase the means of controlling the property and franchises of that company, and for that purpose to borrow half a million dollars on mortgage of its own property and franchises. It has no power to borrow money for that purpose, and if it had the money in its treasury it would have no right to use it for that purpose. The purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads. The charter authorizes the company to construct a railroad (the main line) from the city of Camden, or some point in the county of Camden within a mile of the city, to run to the sea at or near Absecon inlet in Atlantic County, and two branches from some convenient point in the main road, to be determined by the company, one to run to Batsto vil-

lage in Burlington County, and the other to May's Landing in Atlantic County. P. L. of 1852, p. 265. The narrow-gauge road runs, as before stated, from Camden to Atlantic City. Obviously, the acquisition of it cannot be regarded as authorized by a grant of power to build branches from the defendant's main line to Batsto and May's Landing. The transaction under consideration must be regarded as an agreement to buy stock and bonds, and unsecured debt of an insolvent corporation. As such, irrespective of the assumed ulterior object in the purchase, it is not even suggested that it is legitimate. It does not appear that the rolling stock included in the bargain, and valued therein at \$109,000, is to be purchased for use on the defendant's road, but it is reasonable to conclude that it is not, seeing that it is adapted to the narrow-gauge road, and therefore not to the defendant's. Moreover, it is apparent that the agreement is to be regarded as a whole, and is so regarded by the defendant. As a purchase with a view to extinguishing competition the transaction is clearly *ultra vires*. *Colles v. Troy City Directory Co.*, 11 Hun, 397.

It is urged that to induce this court to interfere by injunction in such a case as this, it must appear that the complainant will, if it withholds its prohibition, sustain irreparable injury, and it is insisted that so far from being an injury to the stockholders the proposed purchase will be of very great advantage. It is also urged that the complainant is a mere volunteer; that he acquired his stock after the negotiations for the purchase in question were begun, and got it for the very purpose of defeating the project. To dispose of the latter objection: It appears that the complainant is a stockholder. If, in fact, he acquired his stock at the time and with the design alleged in the answer, that would not affect his right to the relief which he seeks. But those things appear only from the averments of the answer, and those averments are not responsive and are therefore no evidence, and if they were they are not verified. As to the former objection: The proceeding in question is, as before stated, strictly *ultra vires*. In such a case equity will give such appropriate relief as may be practicable against the illegal act, and that, too, at the suit of a single stockholder; while on the other hand, it will not interfere in a matter involving no breach of trust but only error of judgment on the part of the representatives of the company, even though such error may eventuate in the injury of the stockholders. *Potter on Corp.* 130, 131, 132; *High on Inj.* § 767; *Boone on Corp.* §§ 148, 149; *Kean v. Johnson*, 1 Stock, 401; *Gifford v. N. J. R. R. Co.*, 2 Stock, 171; *Beman v. Rufford*, 6 Eng. Law & Eq. 106; *Grant on Corp.* 290; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 3 C. E. Gr. 178; *Black v. Del. & Rar. Can. Co.*, 9 C. E. Gr. 455. In a recent case, *Hawes v. Contra Costa Walter Co.*, 21 Am. Law Reg. (N.S.) 252, the Supreme Court of the United States, in laying down the principles

governing the class of cases in which a stockholder of a corporation may maintain a suit in equity in his own name, founded on a right of action existing in the corporation itself, and in which it is the appropriate complainant, recognized the following grounds: Where some action is taken or threatened by the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by the charter or other source of organization; or where there is such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other stockholders, as will result in serious injury to the corporation or to the interests of the other stockholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other stockholders; or where the majority of the stockholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by the aid of a court of equity. And the court adds that possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers. In the case in hand, the illegal agreement has been made, in behalf of the company, by its president, subject to the approval of the directors and stockholders. The directors have already approved of it. It is true they have provided by resolution for the calling of a special meeting of the stockholders to pass upon it; but the voice of such a meeting could not authorize the project if it be beyond the powers of the corporation. It is enough to warrant the interference of this court to know that it is the admitted intention of the board to execute the illegal agreement, provided the holders of a majority of the stock are favorable to it. The motion to dissolve is denied, with costs.

The statute, 21 Jac. I. c. 8, prohibiting monopolies, has been said to be merely declaratory of the common law: *Norwich Gas Co. v. Norwich City Co.*, 25 Conn. 38; but see *Com. v. Canal Commrs.*, 5 W. & S. 394; *Pennock v. Dialogue*, 2 Pet. 1.

Whether a monopoly can be granted by the legislature: *Hecker v. New York Balance Dock Co.*, 18 How. Pr. 549, 24 Barb. 215; *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396; *Enfield Co. v. Hartford R. R. Co.*, 17 Conn. 40. See *Gibbons v. Ogden*, 9 Wheat. 1; *Western Union Co. v. Atlantic & Pac. Co.* 5 Nev. 102.

The grant of a monopoly must be express, and can never be implied: *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh, 42; *Gaines v. Coates*, 51 Miss. 385; *Mohawk Bridge Co. v. Utica R. R. Co.*, 6 Paige, 554; *Thompson v. New York R. R.*, 3 Sandf. Ch. 625; *McLeod v. Burroughs*, 9 Ga. 213; and such will be the construction of a personal covenant, *Stull v. Westfall*, 24 Hun, 1; *Stephens v. Aulls*, 3 T. & C. (N. Y.) 781; *Williams v. Tiedemann*, 6 Mo. App. 269.

A municipal corporation cannot grant a monopoly, as an exclusive right to

run omnibuses in the city: *Logan v. Pyne*, 43 Iowa, 524; or to slaughter animals, *Chicago v. Rumpff*, 45 Ill. 90; *Live Stock Assn. v. Crescent City Co.*, 1 Abb. (U. S.) 388; *Nash's Case*, 83 U. C. Q. B. 181. See *Belden v. Fagan*, 23 La. Ann. 545; *Slaughter House Cases*, 16 Wall. 36; *Crescent Co. v. Butchers' Co.*, 9 Fed. Rep. 743; or to manufacture and supply illuminating gas, *State v. Cincinnati Gas Co.*, 18 Ohio. St. 262; *Norwich Gas Co. v. Norwich City Gas Co.*, 25 Conn. 20; *East St. Louis v. St. Louis Gas Co.*, 98 Ill. 415; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; but see *State v. Milwaukee Gas Co.*, 29 Wis., 454; *People v. Bowen*, 30 Barb. 24, 21 N. Y. 517; or prevent one citizen only from carrying on a dangerous business in the city, *Hudson v. Thorne*, 7 Paige, 261; *Tugman v. Chicago*, 78 Ill. 405. See *Richmond R. R. Co. v. Richmond*, 96 U. S. 521; or to provide a market-house, *Gale v. Kalamazoo*, 23 Mich. 344; *Cougot v. New Orleans*, 16 La. Ann. 21. See *Caldwell v. Alton*, 33 Ill. 416; *Bloomington v. Wahl*, 46 Ill. 489; or to establish and run a ferry, *Minturn v. Larue*, 23 How. 435; see *Johnson v. Crow*, 87 Pa. St. 184; *Broadway Co. v. Hankey*, 31 Md. 346; *Hall v. Minturn*, 55 N. Y. 676; *Burlington Co. v. Davis*, 48 Iowa, 133; *Midland Ferry Co. v. Wilson*, 1 Stew. Eq. 587, note.

A railroad or other corporation has no power, without legislative authority, to transfer or lease its road or franchises to another railroad company: *Kean v. Johnson*, 1 Stock. 401; *Black v. Del. & Rar. Canal Co.*, 7 C. E. Gr. 130, 9 C. E. Gr. 455; *Troy R. R. Co. v. Kerr*, 17 Barb. 581; *Clark v. Omaha R. R.*, 5 Neb. 314; *Johnson v. Shrewsbury R. R.*, 17 Jur. 1015, 3 De G. M. & G. 914; *McMillan v. Mich. South. R. R.*, 16 Mich. 79; *Shrewsbury R. R. v. London R. R.*, 17 Jur. 845; *Occum Co. v. Sprague Co.*, 34 Conn. 529; *Thomas v. West Jersey R. R.*, 101 U. S. 71; *East Anglian R. R. v. Eastern Co. R. R.*, 11 C. B. 775; *Campbell v. Marietta R. R.*, 23 Ohio St. 168; *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42; *Pinto Co. Case*, L. R. (8 Ch. Div.) 263; *Boston R. R. v. New York R. R. (R. L.)*, 23 Alb. L. J. 518; *Campbell's Case*, L. R. (9 Ch. App.) 1; *Simpson v. Westminster Co.*, 8 H. L. Cas. 712; *Era Ins. Co.*, 6 Jur. (N. S.) 1334; *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch. 727; *Price v. St. Louis Ins. Co.*, 3 Mo. App. 262; *Cozart v. Georgia R. R.*, 54 Ga. 379; or to consolidate with another, *York R. R. Co. v. Winans*, 17 How. 80; *International R. R. v. Bremond*, 53 Tex. 96; *Charlton v. New Castle R. R. Co.*, 5 Jur. (N. S.) 1096; *McCray v. Junction R. R.*, 9 Ind. 359; *State v. Bailey*, 16 Ind. 46. See *Central R. R. Co. v. Georgia*, 40 Ga. 582, 92 U. S. 665; *State v. Greene Co.*, 54 Mo. 540; *Denike v. New York Lime Co.*, 80 N. Y. 599; *Chicago R. R. v. Lake Shore R. R.*, 11 Rep. 323; *Field on Corp.* chap. XVI. Not even by the assent or ratification of all the stockholders, *Ashbury R. R. Co. v. Riche*, L. R. (9 Exch.) 224, (7 H. L.) 653, 14 Moak 81, note; *Colman v. Eastern Co. R. R.*, 10 Beav. 1; *National Trust Co. v. Miller*, 6 Stew. Eq. 155; *New Orleans R. R. Co. v. Harris*, 27 Miss. 517; *Albert Assurance Co. L. R.* (6 Ch. App.) 381; *Eakin v. St. Louis R. R.*, 3 Cent. L. J. 655.

Nor power to become a stockholder in another railroad: *Central R. R. Co. v. Collins*, 40 Ga. 582; *Compagnie Française v. Western Union Co.*, 11 Fed. Rep. 842; *Salomons v. Laing*, 6 Eng. Ry. Cas. 289; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; *Taylor v. Earle*, 8 Hun, 1; *Buford v. Keokuk Co.*, 3 Mo. App. 159. As to purchasing its own shares, see *Dronfield Co.'s Case*, L. R. (17 Ch. Div.) 76; *Curier v. Lebanon State Co.*, 56 N. H. 262; *Barton v. Port Jackson Co.*, 17 Barb. 397; *Green's Brice's Ultra Vires*, 94; *Hope v. International Soc.*, L. R. (4 Ch. Div.) 327. An agreement by two or more stockholders to buy a majority of the stock and control the corporation thereafter, is unenforceable, *Jacobs v. Miller* (N. Y.), 15 Alb. L. J. 188. See *McMurray v. Northern R. R.*, 23 Grant's Ch. 184.

Contracts between rival railroads to prevent competition will not be enforced: *Wiggins Ferry Co. v. C. & A. R. R.*, 5 Mo. App. 347, 73 Mo. 389;

Hartford R. R. v. New Haven R. R., 8 Rob. (N. Y.) 411; Peoria and Rock Island R. R. v. Mining Co., 68 Ill. 489, 12 Am. Law Reg. (N. & S.) 284, note; Shrewsbury R. R. v. London R. R., 17 Jur. 845; Pearce v. Peru R. R., 21 How. 441; but, on the contrary, may be restrained, State v. Hartford R. R., 29 Conn. 538; People v. Albany R. R., 24 N. Y. 261; or between a railroad and express company, Sanford v. R.R. Co., 24 Pa. St. 378; New England Ex. Co. v. Maine R. R. Co., Me. 188; Southern Ex. Co. v. Nashville R. R. Co., 20. Am. Law Reg. (N. S.) 590, 602, note; McDuffee v. Portland R. R., 52 N. H. 430; Texas Ex. Co. v. Texas R. R. Co., 6 Fed. Rep. 426; so, between manufacturers, Central Salt Co. v. Guthrie, 53 Ohio St. 666; Hilton v. Eckersley, 6 E. & B. 47; India Bagging Assn. v. Kock, 14 La. Ann. 168; or, producers and dealers, Morris Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Clancey v. Onondaga Salt Co., 62 Barb. 395; Craft v. McConoughy, 79 Ill. 346; Arnot v. Pittston Coal Co., 2 Hun 591, 68 N. Y. 558; Crawford v. Wick, 18 Ohio St. 190; Raymond v. Leavitt, 46 Mich. 447; or proprietors of boats, Stanton v. Allen, 5 Denio, 434; Pratt v. Tapley, 8 Pugs. 168; Hooker v. Vandewater, 4 Denio 349; Anon., 2 Wart. Prec. *658; Murray v. Vanderbilt, 39 Barb. 140. See Palmer v. Stebbins, 3 Pick. 188; Collins v. Locke, L. R. (4 App. Cas.) 674; Jones v. Fanning, Morris 348, or of two lines of stages, Bennett v. Dutton, 10 N. H. 481; or a railroad company and a ferry company, Lyde v. Eastern R. R. Co., 36 Beav. 10; or a railroad company and a stage-owner, Marriott's Case, 1 C. B. (N. S.) 499; See Parker v. Great Western R. R., 11 C. B. 545; Wiswall v. Greenville Co., 8 Jones Eq. 183; or a railroad company and parlor car company, Pullman Palace Car Co. v. Texas and Pacific Co., 11 Fed. Rep. 635, and 682, note; or a railroad company and telegraph company, Western Union Co. v. Union Pac. Co., 3 Fed. Rep. 1; Western Union Co. v. St. Joseph R. R., Id. 430; Western Union Co. v. American Union Co., 65 Ga. 160; Atlantic & Pac. Co. v. Union Pac. R. R., 1 Fed. Rep. 745; Western Union Co. v. Burlington Co., 11 Fed. Rep. 1, 10, note; Western Union Co. v. Kansas Pac. R. R. Co., 4 Fed. Rep. 284; or injurious discriminations in the delivery or transportation of freight, Rogers Loco. Works v. Erie R. R. Co., 5 C. E. Gr. 879; Chicago & N. W. R. R. v. People, 56 Ill. 865; Crouch v. London & N. W. R. R., 14 C. B. 255; Garton v. Bristol R. R., 6 C. B. (N. S.) 639; Pickford v. Grand Junction R. R., 10 M. & W. 399; McDuffee v. Portland R. R., 52 N. H. 430, 455; Twells v. Pa. R. R. Co., 4 Am. Law Reg. (N. S.) 728, 733, note; Union Locomotive Co. v. Erie R. R. Co., 8 Vr. 23; David v. Western Union R. R., 1 Cin. S. C. 100. See Fitchburg R. R. v. Gage, 12 Gray, 398; Baxendale v. Great Western R. R., 5 C. B. (N. S.) 809; Chicago R. R. v. Parks, 18 Ill. 460; Munhall v. Pa. R. R. Co., 92 Pa. St. 150; Morris and Essex R. R. v. Sussex R. R., 5 C. E. Gr. 548; Stewart v. Lehigh Valley R. R. Co., 9 Vr. 505.

A contract between a railroad company and a telegraph company, whereby the former agreed to give the latter the exclusive right of way for telegraphic purposes, so far as it legally might, and to discourage competition, was held not void: Western Union Tel. Co. v. Chicago & P. R. R., 86 Ill. 246; Western Union Co. v. Atlantic & Pac. Co., 7 Biss. 367; so, of a contract by an individual not to run, own or be interested in any line of packet boats on the Erie canal, Chappel v. Brockway, 21 Wend. 157; or not to run boats on a certain line of travel, California Nav. Co. v. Wright, 6 Cal. 258; Oregon Nav. Co. v. Winsor, 20 Wall. 64; Dunlop v. Gregory, 10 N. Y. 241; but see Wright v. Ryder, 86 Cal. 342; or a stage-coach, Pierce v. Fuller, 8 Mass. 223; Hearn v. Griffin, 2 Chit. 407; or to furnish recruits for an army, Marsh v. Russell, 66 N. Y. 288; see Skeels v. Phillips, 54 Ill. 309; or to keep a hotel, Mossop v. Mason, 16 Grant's Ch. 302, 17 Id. 360, 18 Id. 453; McAlister v. Howell, 42 Ind. 15; Hooper v. Broderick, 11 Sim. 47; or a school, Spier v. Lambdin, 45 Ga. 319; or not to start a rival newspaper, Beal v. Chase, 31 Mich. 490. See Presbury v. Fisher, 18 Mo. 50; or to carry newspapers, Fallon v. Chronicle Co., 1 Mac-Arth, 485; or a contract between a railroad and an elevator company that the

latter should handle all through grain exclusively, *Richmond v. Dubuque R.R.*, 33 Iowa, 422; as to trades-unions, see *Master Stevedores Assn. v. Walah*, 2 Daly 1; *Snow v. Wheeler*, 118 Mass. 179; *People v. Fisher*, 14 Wend. 9; *Leather Cloth Co. v. Lonsont*, L. R. (9 Eq.) 345; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168; *State v. Donaldson*, 3 Vr. 151; *Rex v. Batt*, 6 C. & P. 329; *Wallsby v. Anley*, 8 El. & El. 516.

See, further, 1 *Smith's L. C.* 172; *Avery v. Langford, Kay*, 663; *Gravely v. Barnard*, 10 Moak 836.—

J. STILL STOWELL AND J. DORR STOWELL

v.

EMORY A. STOWELL.

(45 *Michigan Reports*, 364.)

A promissory note, payable to the treasurer of the Chicago and Canada Southern Railway Company, was made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of passenger and freight depot" at Dundee; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond Dundee, so as to form a through line. *Held*, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated.

Error to Monroe: Submitted Jan. 6. Decided Jan. 26.

ASSUMPSIT. Plaintiffs bring error. Reversed.

Grosvenor and Landon for plaintiffs in error. A contract, if its language is plain, must be carried into effect according to its manifest meaning: *N. A. Ins. Co. v. Throop*, 22 Mich. 146; *Strohecker v. Farmer's Bank*, 6 Penn. St. 41; *Benjamin v. McConnell*, 4 Gilm. 536; *Railroad v. Trimble*, 10 Wall. 367; *Collender v. Dinsmore*, 55 N. Y. 200; *Huntington v. Dinsmore*, 4 Hun. 66; and where the consideration is expressed no other can be proved: 1 *Para. Cont.* 430; *Johnson v. Sutherland*, 39 Mich. 580.

C. A. & J. A. Stacy, E. D. Kinne and S. C. Randall for defendant in error.

GRAVES, J.—The plaintiffs brought this action on an instrument of the following tenor:

"\$50.

DUNDEE, MICH., March 5, 1872.

"In consideration of the construction of the Chicago and Canada Southern Railway through or within one-half mile of the village of Dundee in the county of Monroe, State of Michigan, within

three years of this date and the building of passenger and freight depot at Dundee, Mich., I promise to pay to the treasurer of said railway company or bearer, the sum of fifty dollars in thirty days after said road and depot are constructed as aforesaid."

"EMORY A. STOWELL."

The suit was commenced before a justice of the peace and was appealed to the Circuit Court and under the rulings of the judge a recovery was denied.

The only question which calls for remark arises on the meaning of the contract, and for the purpose of its solution a resort to extrinsic matters resting in parol is not required and should not be allowed. The view taken of the case will be explained briefly. My own opinion may be thus stated: in specifying the Chicago and Canada Southern Railway and in referring to the construction of its road, the parties contemplated not only the identical corporation so named, but also the very road from one point to another as it stood described in the charter. It was regarded as a single and entire work to extend from one fixed and known point to another and hence the writing made no provision for applying the arrangement to anything less or anything different. The locality of these points was not expressed in writing, but it was assumed to be understood. The reference to the corporation and the circumstances connecting the agreement with the charter would authorize a recourse to the latter, when necessary, to show where the road was to begin and where it was to end, and thus afford the contract all needed aid on the subject.

The effect was to render the charter description as completely a part of the instrument in suit as it would have been in case the parties had actually inserted it. According to this theory, which seems to me to be the true one, it would, in my view of it, follow that the things to be performed as preliminary to any right to the \$50 were—first, the construction within three years of the Chicago and Canada Southern Railway from one charter point to the other; and second, its construction between the termini in such manner as that it should pass through Dundee or within half a mile and be there provided with a passenger and freight depot. But this construction of the agreement was not complied with. The charter contemplated that the road to be built should extend from the east line of Monguagon, in Wayne County, in this State, to the city of Chicago, and it has been built no further west than Fayette in the state of Ohio, a distance of about seventy miles. It is not denied that in building this section the agreement has been so far observed. The road runs past Dundee and a passenger and freight depot is put up there. It is also true that by connecting with other roads a through line to Chicago is established.

Still, as I regard the contract, the maker of it bargained for something more. His promise required that the whole line should

be built, and not merely a section of it, and the claim would not be unreasonable that a distinct and independent road made by the company for the whole distance would promise greater local advantage and a more valuable return for contributions than a short road operated in connection with roads of other companies to complete the line. This opinion agrees with that of the circuit judge.

But my brethren hold that this conclusion is erroneous. In their judgment the case is plainly governed by *Swartwout v. Mich. Air Line R. R. Co.* 24 Mich. 389. They are satisfied that the contract itself, when read in connection with the chartered powers and purposes of the corporation, and with a proper regard for those considerations of practical importance which manifestly actuated the parties, fairly imports that the promise was made to afford aid in constructing the road, and contemplated that the money should be payable in case of the completion as agreed of that part of the line which has been built, and that a construction which would defer the right to call for payment until the whole line should be actually built by the company, or would deny the right to payment in case of failure to construct the road the entire distance to Chicago within three years, would defeat the intent of the parties and disappoint the manifest object which was meant to be carried out.

As a consequence of this construction the judgment must be reversed with costs, and a new trial granted.

The other justices concurred.

ST. LOUIS, JACKSONVILLE AND CHICAGO RAILROAD COMPANY

v.

JULIET M. MATHERS.

(*Advance Case Illinois, Springfield. September 28, 1882.*)

Where property is conveyed to trustees in trust, for the benefit of a railroad company, under a contract which is contrary to public policy, and illegal, a court of equity will not aid either party in any effort he may make to reap the benefits which may flow from such illegal contract.

So, where the owner of lots conveyed the same in trust, for the benefit of a railroad company, in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterward reconveyed the property back to the grantor, it was held, that the company could not maintain a bill to have the lots sold for its benefit, and have the same again conveyed to a trustee for its benefit, nor could it claim the right to have the taxes paid on the lots made a charge thereon for its reimbursement.

In determining whether a contract is illegal, the entire contract on both

sides will be considered, and if the consideration is illegal, no part of it will be enforced. One part can not be disregarded, and the other enforced.

If a party pays taxes on land which belongs to another, under the mistaken belief of ownership, a court of equity will not grant him any relief by which he may be reimbursed the sum paid.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. Brown, Kirby and Russell for the appellant:

The court below erred in rendering the decree dismissing complainant's bill. This court has very plainly decided that the evidence was incompetent to affect the validity of the deed of April 25, 1860. *St. Louis, Jacksonville, and Chicago R. R. Co. v. Mathers*, 71 Ill. 572.

A condition in a grant which is contrary to the policy of the law, is void. *Doe dem, Mitchinson v. Carter*, 8 T. R. 61.

If the condition subsequent be against the law, the estate of the grantee being once vested is not thereby divested, but it becomes absolute, and a court of equity will never lend its aid to divest an estate for the breach of a condition subsequent. 4 Kent's Com. (5th ed.) 130; 1 Washburn on Real Prop. 447.

The court below should at least have charged the land in question with the taxes paid on it by appellant. The rule is, that when one, in good faith, believing himself to be the owner, either in law or in equity, of a piece of land, has made necessary and valuable improvements thereon, upon the defeat of his title should be reimbursed for his outlay. *Union Mutual Ins. Co. v. Campbell*, 95 Ill. 267; *Smith et al. v. Knoebel et al.* 82 id. 392; *Kinney et al. v. Knoebel*, 51 id. 114.

Messrs. Morrison, Whitlock & Lippincott, for the appellee:

The deed of April 25, 1860, and the resolution of May 2, 1860, are parts of the same transaction, and were construed together in *St. Louis, Jacksonville and Chicago R. R. Co. v. Mathers*, 71 Ill. 592.

The complainant and defendant were equally involved in an unlawful combination, and a court of equity will assist neither. *Craft et al. v. McConoughy*, 79 Ill. 346; *Jerome v. Bigelow*, 66 id. 452; *Henderson v. Palmer*, 71 id. 579; *Paton et al. v. Stewart*, 78 id. 481; *Parsons v. Elby et al.* 45 id. 232; *Lyon v. Culbertson*, 83 id. 33; *DeWolf v. Pratt*, 42 id. 148; 1 Story's Eq. Jur., secs. 297, 298.

If the court can, upon equitable principles, compel the payment of the sums paid for taxes by appellant, it can, on the same principles, enforce the performance of the contract. *Craft et al. v. McConoughy*, 79 Ill. 344; *Neustadt v. Phillippi*, 54 id. 309; *Jerome v. Bigelow*, 66 id. 452.

MR. JUSTICE CRAIG delivered the opinion of the Court.

The principal facts presented by this record were before this court at the January term, 1874, in the case of St. Louis, Jacksonville and Chicago R. R. Co. v. Mathers, reported in 71 Ill. 592. In the case cited, Mathers filed a bill to compel the trustees, who held the legal title to the lots in question, to convey to him, on the ground that the railroad company had disregarded the contract under which it obtained the conveyance. Since the decision was rendered, the trustees, of their own accord, conveyed the property to John Mathers, and this bill was brought by the railroad company to obtain a decree for a sale of so many of the lots as may be necessary to pay taxes which have been advanced by it, and to pay for the erection of a freight house, side track, etc., and if any of the lots remain, that Mathers be required to convey them to a trustee to be designated by the court. On a hearing in the circuit court, a decree was rendered dismissing the bill, which, on appeal, was affirmed in the appellate court.

The consideration for the conveyance to the trustees named in the deed was, that no depot or station should be established within three miles of Ashland. The board of directors of the railroad company adopted a resolution accepting the donation of the property upon these terms and conditions. When the case was here before, the contract was held to be illegal and it was held that a court of equity would not lend its aid to enforce the performance of such a contract. In deciding the case it was said: "A court of equity will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of doing that which is illegal; and where such a contract has been executed by one of the parties by conveying real estate, a court of equity will not, in general, interfere, but will leave the title to the property where the parties have placed it." This was said in the case when Mathers undertook, by a bill in equity, to obtain a reconveyance of the property on the ground that the railroad company had failed and refused to abide by the agreement under which the property was conveyed. Mathers now has a deed of the property, and the railroad company call upon a court of equity to restore the property back to it, or, what is the same thing, order it sold, and give the railroad the proceeds of such sale. What was said when the case was here before, may with propriety be said again. The same principles of equity which controlled before must govern now. The contract under which the property was conveyed for the benefit of the railroad company was contrary to public policy, and illegal, and a court of equity will not aid either party in any effort they may make to reap the benefits which may flow from such illegal contract. Had the property been conveyed to the railroad company in such a manner that it could have converted it without the aid of the courts, then the company would have reaped the benefits of the conveyance, al-

though the contract under which the property was conveyed was illegal ; but when the company call upon a court of equity to assist it in holding the property or reclaiming it, a different rule prevails. Courts of equity do not assist parties to enforce illegal contracts, but will leave them in the position they have placed themselves.

But it is suggested that the resolution of the railroad company under which the conveyance was made is in the nature of a condition subsequent, and being void, the deed took effect as an absolute, unconditional conveyance, upon the terms specified in the deed, and that the railroad is entitled to relief against the subsequent diversion of the land. So far as this action is concerned, we do not regard it material whether the resolution is to be considered in the nature of a condition subsequent or not. The resolution, which specifies the terms and conditions of the conveyance, is a part and parcel of the contract under which the legal title to the property passed to the trustees,—grantees in the deed of conveyance. The complainant, in order to obtain relief, must show itself free from the taint of the illegal contract. This it can not do. It was not a purchaser of the property for value. It paid no consideration for the property. Its title came by and through an illegal contract, and one-half of that contract can not be disregarded and the other half enforced, but when a court of equity is called upon to grant affirmative relief, the whole contract will be considered, and if it appears to be illegal, the court will deny relief, and leave the parties where they have placed themselves by their illegal bargains.

The company has paid taxes on the property, and the amount thus paid, with interest, it is contended, ought at least to have been charged upon the property. It is unfortunate for the company that it has paid the taxes on this property, but we are not aware of any authority which would justify a court of equity in making the amount paid a charge on the land. We have no doubt that many cases have occurred where parties have paid taxes on land under the belief of ownership, and it afterward turned out that the land belonged to another, and yet we are not aware of any instance in which the party who has thus paid out his money has been relieved in equity.

The decision of the appellate court will be affirmed.

Judgment affirmed.

LAWRENCE

v.

SMITH.

(Advance Case, U. S. Supreme Court.)

In an action upon a subscription in the form of a note, to aid in the construction of a railroad, it was competent for the defendant to show by the subscription papers and by the declarations of the agent who procured the note, that the railroad was to be built between certain points. The leasing of a part of the road between two points is not a compliance with the contract to construct a road between said points.

APPEAL from Poweshiek District Court, March 24.—The plaintiff brings this action upon a promissory note executed to the Grinnell & Montezuma Railroad Company, or bearer. The petition and amended petition allege that the railroad was completed as stipulated in the note, and that certificates of stock have been issued and tendered to the defendant. The answer to the petition and amended petition admits the execution of the note and the tender of the stock as alleged. The answer alleges that the Grinnell & Montezuma Railroad referred to in said note, and in the articles of incorporation of said company, was a railroad commencing at Grinnell, Iowa, and ending at Montezuma, Iowa; that such railroad has not been completed, no railroad having been constructed within three miles of Grinnell. The cause was submitted to a jury, and a verdict was returned and a judgment rendered in favor of plaintiff for \$208. The defendant appeals. The cause was before the court on a former appeal. See 50 Iowa, 703.

Clark & Cheshire, for appellant.

No argument for appellee.

DAY, J.—The instrument upon which the plaintiff sues is as follows:

"For value received, I promise to pay to the Grinnell & Montezuma Railroad Company, or bearer, the sum of two hundred dollars, upon the completion of said railroad and cars running thereon to the depot at Montezuma, Iowa, if done within one year from the first day of January, 1875, with interest at the rate of ten per cent per annum from maturity.

"This note to be due and payable when the cars run to the depot above named, within the time above stipulated, and on such payment the G. & M. R. R. Company agree to issue to the maker of this note a certificate of stock for each one hundred dollars mentioned in this note; but if said road be not completed, within the time above named, this note to be void, and on demand returned to the maker. Said road to be standard gauge."

The articles of incorporation of the railroad company in question, which were introduced in evidence, declare the objects of the incorporation to be "to build the Grinnell & Montezuma Railroad and construct a telegraph line." The jury returned a special finding that the Grinnell & Montezuma Railroad has been constructed between Montezuma and a point three and one-half miles south of Grinnell on the Central Railroad of Iowa. The defendant introduced subscription papers to the capital stock of the railroad in question, showing that the various subscribers agreed to pay the several sums set opposite their names "to the stock of the Grinnell & Montezuma R. R. Company to aid in the construction of a railroad from Grinnell to Montezuma." The defendant also testified that when he gave his note it was represented to him, by the person to whom he gave it, that the Grinnell & Montezuma Railroad was to be built from Grinnell to Montezuma. Upon the submission of the cause the court withdrew all this testimony from the jury, and instructed the jury as follows:

"Under the articles of incorporation and the note or contract sued on, the plaintiff is entitled to recover, if he has shown that the Grinnell & Montezuma Railroad Company constructed its road on the line between Grinnell and Montezuma, from Montezuma, a distance of thirteen miles, to intersect with the Central Iowa Railroad at a point three and one-half miles south of Grinnell, and that the cars were running on such road by it built and over said Central Iowa Railroad, under a lease, between said point of intersection and Grinnell, to the depot at Montezuma, before January 1st, 1876, and that prior to that time and continuously since, said railroad, and by such means, has established and maintained railroad communication between said two points, it being conceded that defendant has been tendered the stock called for in the contract."

In this action the court erred. It was competent to show by the subscription papers, taken by the defendant to its stock, that the Grinnell & Montezuma Railroad was a railroad to be built from Grinnell to Montezuma. It was also competent to show the declaration of the agent of the defendant, who procured the note, that the railroad was to be built from Grinnell to Montezuma. This declaration was simply in harmony with the written subscriptions, and showed the inducement which was held out to the defendant for the execution of his note. The evidence does not vary or contradict the note, but simply shows that the defendant executed it with the understanding that the road would be built as specified in the stock subscription. That the leasing and operation of a part of a road between two points is not a compliance with an agreement to construct a road between said points. See *Lamb v. Anderson*, 54 Iowa, 190.

Reversed.

We propose to consider briefly in this note the subject of subscriptions to railroad companies conditioned upon the construction of the road in a certain locality. Subscriptions to stock are frequently made upon such condition. It is to be construed as a condition precedent, and until fulfillment, the company can maintain no action against the subscriber. *McMillan v. Maysville and Lexington R. R. Co.*, 15 B. Mon. 218; *Henderson and Nashville R. Co. v. Leavell*, 16 B. Mon. 858; *Trott v. Sarchett*, 10 Ohio St. 241; *Chamberlain v. Painesville and H. R. Co.*, 15 Ohio St. 225; *Ashtabula and New L. R. R. Co. v. Smith*, 15 Ohio St. 328; *Mansfield, Coldwater and Lake M. R. R. Co. v. Brown*, 26 Ohio St. 223; *Mansfield, Coldwater and Lake M. R. R. Co. v. Stout*, 26 Ohio St. 241; *Fisher v. Evansville and Crawfordsville R. R. Co.*, 7 Ind. 407; *Evansville Md. and C. S. L. R. Co. v. Shearer*, 10 Ind. 244; *New Albany and Salem R. R. Co. v. McCormick*, 10 Ind. 499; *Parker v. Thomas*, 19 Ind. 218; *Cumberland Valley R. R. Co. v. Baab*, 9 Watts, 458; *Rhey v. Evansburg and Susquehanna Plank Road Co.*, 27 Pa. 261; *Martin v. Pensacola and Ga. R. R. Co.*, 8 Fla. 370; *Burlington and Mo. R. R. Co. v. Boestler*, 15 Iowa, 555; *Racine Co. Bank v. Ayers*, 12 Wis. 512; *Spartanburg and Union R. R. Co. v. De Graffenried*, 12 Rich. 675; *Bucksport and B. R. Co. v. Brewer*, 67 Me. 295; *B. C. R. and M. R. Co. v. Palmer*, 42 Iowa, 223; *Stevens v. Corbut*, 33 Mich. 458; *Warner v. Callender*, 20 Ohio St. 190; *Woonsocket, Union R. Co. v. Sherman*, 8 R. I. 564.

The same principles apply in cases of cash subscriptions or notes made upon like condition. *First National Bank v. Hurford & Bro.*, 29 Iowa, 579; *Freeman v. Matlock*, 67 Ind. 99; *First Nat. Bank v. Hendrie*, 49 Iowa, 402; *Carlisle v. Terre Haute and Richmond R. R. Co.*, 6 Ind. 316; *Berryman v. Trustees Cinn. S. R. R. Co.*, 14 Bush, 755; *Mich., Midland and C. R. Co. v. Bacon*, 33 Mich. 466; *Rose et al. v. San Antonio and Mexican Gulf R. Co.*, 31 Tex. 49. Also in case of a subscription of a tract of land. *McClure v. Missouri River, Ft. S. and G. R. Co.*, 9 Kans. 378.

In New York, subscriptions conditioned upon the adoption by the railroad of a certain route, have been held void as opposed to public policy, in as much as they tend to defraud those who subscribe absolutely and without condition, and induce a location calculated rather to subserve private interests than the public good. *Fort Edward and Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 583; *Utica S. R. Co. v. Brinckerhoff*, 21 Wend. 139; *Macedon and B. Plank Road Co. v. Snediker*, 18 Barb. 317; *Butternut and Ohio Turnpike Co. v. North*, 1 Hill 518. It seems, moreover, that unless the company agrees at the time to adopt the route, the contract is considered to be invalid, for lack of mutuality and consideration.

In Pennsylvania, subscriptions conditional upon location are valid, when made to the corporation itself. Where, however, they are made to commissioners before the granting of the charter, the condition is held void, and the subscription is deemed binding. *Barrington v. Pittsburgh and S. R. Co.*, 34 Pa. St. 358; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Nippenose Mfg. Co. v. Stadon*, 68 Pa. St. 256; *Caley v. Phila. and C. Co. R. R. Co.*, 80 Pa. St. 363; *McCarty v. Selinsgrove and N. B. R. R. Co.*, 87 Pa. St. 392.

In most states, however, the law is not thus, and subscriptions conditioned on a particular location are valid unless clearly opposed to public policy. A subscription conditioned upon the erection of a depot in a particular part of a town through which the line was to run was held valid in *Racine Co. Bank v. Ayers*, 12 Wis. 512, the court saying:

"The charters of these companies impose such restrictions and requirements upon them as in the opinion of the legislature the public interest and public policy demand. And it having done so, it must be assumed that within these limits the company is left to accomplish the enterprise as best it may. And the mere fact that it may appear in some agreement that motives of private interest may, to some extent, operate in influencing its action,

ought not to be held to make such agreement void as against public policy. It is vain to suppose that such enterprises can be accomplished without the operation of such motives. They constitute the mainspring of human action, and must inevitably operate to a greater or less extent in the execution of all great enterprises of this character, and we think it may be safely assumed that so long as the company complies with the requirements of the charter, the struggle between conflicting private and local interests will, from the necessity of the case, be so adjusted as best to advance the enterprise and accommodate the public generally." *Racine Co. Bank v. Ayres*, 12 Wis. 512; *First National Bank v. Hendrie*, 49 Iowa, 402.

Contracts with the officers of a railroad company, inducing them to adopt a certain location would, of course, be condemned as invalid. *Berryman v. Trustees Cum. S. R. Co.*, 14 Bush. 755.

The objection in the New York cases as to lack of mutuality in conditional subscriptions, is disregarded. *Des Moines Valley R. R. Co. v. Graff*, 27 Iowa 99.

In general, the condition is complied with when the road is located in the place designated. This is the case even where the words of the condition are that it shall be "built." *Warner v. Callender*, 20 Ohio St. 190. At least, if it be located in good faith and partly built, though no part of it is finished. *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564. But see *Spartanburg and Union R. Co. v. De Graffenried*, 12 Rich. 675, and where the condition is that the railroad shall "pass through" a locality, it is sufficient that it be located, it need not be constructed. *Ashtabula and New L. R. R. Co. v. Smith*, 15 Ohio St. 328; *Mansfield C. and Lake M. R. Co. v. Brown*, 26 Ohio St. 223; *Same v. Stout*, 26 Ohio St. 241; *North Missouri R. Co. v. Winkler*, 29 Mo. 818.

Where the condition was that the road should be "located and constructed" so as the town of Carlisle, a point therein, the subscription was, on the location being fixed, held to be absolute. *McMillan v. Maysville and Lexington R. Co.*, 15 B. Monr. 218. Where the terms of the condition were that the road was to be permanently located on a given route, and that a freight house and depot should be built, the first clause was construed as a condition precedent, the latter as a mere stipulation.

Chamberlain v. Painesville and H. R. R. Co., 15 Ohio St. 255. Where the condition was that the road was to be located "through the town of Brewer satisfactorily to the selectmen of said town," it was held necessary in a suit on the subscription to aver and prove the satisfaction of the select-men. Averments and proof that the road was constructed "wisely, prudently, and judiciously for the interests of the town," were sufficient. *Bucksport and B. R. Co. v. Brewer*, 67 Me. 295.

Where the condition is that the road shall cross a stream north of a certain street, it must cross the stream at a point where a line drawn northerly from the street will intersect it. *New Albany and Salem R. R. Co. v. McCormick*, 10 Ind. 499.

Where the condition was that the depot should be built on a certain block, and subsequently by amendment to the charter, the line was materially shortened, the subscriber was held released from liability, notwithstanding the fact that the depot was erected on the block designated, and that this was of some advantage to him. *Carlisle v. Terre Haute R. R. Co.*, 6 Ind. 316.

In general, no notice is necessary of the performance of the condition in order to fix the liability of the subscriber. The contract of subscription may, however, provide for such notice. Where it does so, and designates a certain form as sufficient, this will not exclude other forms of notice which are in themselves reasonably sufficient, as, for example the construction and operation of the road through the very town in which the subscriber lives. *New Albany and S. R. Co. v. McCormick*, 10 Ind. 499.

Where the terms of the conditional contract are ambiguous, parol evidence is admissible to explain them, though not to contradict them. *Evansville*,

Ind. and C. S. L. R. Co. v. Shearer, 10 Ind. 244; N. and N. W. R. R. Co. v. Jones et al. 2 Cold. 574; Connecticut and P. R. Co. v. Baxter.

And where the condition was to build to a certain town, parol evidence was held admissible to show that from the nature of the ground the parties could not have contemplated an extension into the corporate limits. Detroit, L. L. M. R. R. Co. v. Stames, 38 Mich. 698. Evidence of parol representations on the faith of which the subscription was made, are inadmissible except to prove fraud or mistake. Martin v. Pensacola and Ga. R. R. Co., 8 Fla. 370; Johnson v. Pensacola and Ga. R. R. Co., 9 Fla. 298.

The giving of a note for a conditional subscription is not to be deemed a waiver of the performance of the condition. Parker v. Thomas, 19 Ind. 213. But in case of a conditional subscription of land the giving of a deed is deemed a waiver of the condition. Parks v. Evansville, I. and C. S. L. R. Co., 23 Ind. 567.

Where the company has obtained a subscription by the performance of a condition that the road shall be located on a certain route, it cannot be permitted subsequently to organize a new corporation, erect a parallel line of road on another route, and allow the old one to decay, without making due compensation to the stockholder. Chapman v. Mad River and L. E. R. Co., 6 Ohio St. 119.

As to whether a subscriber may revoke his subscription before the condition on which it is made is complied with, see Lowe v. E. and K. R. R. Co., 8 Head, 659.

In an action to enforce a conditional subscription, the declaration must aver that the condition has been fulfilled. Trott v. Sarchet, 10 Ohio St. 241.

Where the location of the road is set out in the articles of association, and subsequently is changed, subscribers are released from liability. Buffalo C. and N. Y. R. R. Co. v. Potile, 23 Barb. 21; *Contra*, Central Plank Road Co. v. Clemens, 16 Mo. 359. The designated *termini* are in such case part of the contract. Manheim, P. and L. T. or P. R. Co. v. Arndt., 31 Pa. St. 317.

The same effect is produced, where by an amendment to the charter the location is radically changed. Hester v. Memphis and C. R. Co., 32 Miss. 378; Witter v. Missa, O. and R. R. Co., 20 Ark. 463; Winter v. Muscogee R. R. Co., 11 Ga. 438.

In order, however, to release the subscriber, the alteration must be of a material character, and materially damage the interests of the subscriber. Delaware R. Co. v. Thorp, 1 Houst. 149; Johnson v. Pensacola and Ga. R. R. Co., 9 Fla. 298; Barret v. Alton and Sangamon R. R. Co., 13 Ill. 504. In the latter case the court said:

"The corporation must remain substantially the same, and be designed to accomplish the same general purposes, and subserve the same general interests. But such amendments of the charter as may be considered useful to the public and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a bridge at a different point on a stream, or a deviation in the route from an intermediate point, will not have the effect to destroy or impair the contract between the corporation and the subscribers."

See Cross v. Peach Bottom R. R. Co., 90 Pa. St. 374; S. C. 1 Am. and Eng. R. R. Cas. 366. Also Moore v. Hanover Junction and Susquehanna R. R. Co., 4 Am. and Eng. R. R. Cas. 256, and note.

HICKENBOTTOM

v.

THE CHICAGO, BURLINGTON & Q. R. Co.

(Advance Case, U. S. Supreme Court. March 24.)

Where the evidence fully sustains the verdict, the judgment of the court below must be affirmed; and newly discovered evidence, which is merely cumulative, will not entitle the party to a new trial.

APPEAL from Jefferson District Court.—Action to recover double the value of a cow which, it is alleged, was killed on the track of defendant's road by an engine and train, by reason of the want of a sufficient fence upon the line of the railroad. There was a trial by jury and a verdict and judgment for plaintiff. Defendant appeals.

Slagle & McCrackin, for appellant.

Ratcliff & McCoy, for appellee.

ROTHBOK, J.—The principal ground upon which a reversal of the judgment is claimed, is that the verdict finds no support in the evidence. This point is urged in a printed argument which elaborately reviews the evidence, and counsel in an oral argument strenuously contended that under the evidence there was no justification for the verdict, and that notwithstanding the well-known rule prevailing here, a new trial should be granted.

We have each carefully examined the whole record. The evidence appears to be fully presented and our conclusion is that the judgment must be affirmed. It is not to be expected that we will set out and discuss the evidence. The announcement of our conclusion on a question of fact is sufficient. The evidence is of no consequence to the profession and our views upon it would probably leave counsel for the appellant with minds unchanged, firmly believing that the verdict is a great wrong upon their client.

II. The motion for a new trial was grounded, in part, upon certain alleged newly discovered evidence. This evidence was merely cumulative, and therefore was not such as entitled the defendant to a new trial.

Affirmed.

LITTLE ROCK AND FT. SMITH R. R. Co.

v.

PERRY.

(87 *Arkansas Reports*, 164.)

Relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law.

When a complaint at law discloses a purely equitable cause of action, it may be transferred on motion of either party, or of the court's own motion, to the equity docket; but the failure of the court to make the transfer, when neither party asks it, will not be error for reversal. The rule is the same where a purely legal action is brought in equity.

When a complaint in equity contains any equitable element to which the jurisdiction of a Court of Chancery may attach, the court may, in the same cause, administer all proper legal relief essential to complete justice at once to all parties before it; but actions at law, purely legal upon their face, must be decided on legal principles alone.

Whenever a third party enters into a contract with the promoters of a railroad, which is intended to inure to the benefit of the company, and it takes the benefit of the contract, it will be bound to perform it.

In order to recover against a corporation in an action at law for services rendered before its being, the plaintiff must prove either an express promise of the new company, or that the contract was made with persons then engaged in its promotion and taking preliminary steps thereto, and was made on behalf of the new company in the expectation of the plaintiff, and with the assurance of the projectors, that it would become a corporate debt; and that the company afterward entered upon and enjoyed the benefit of the contract and by no other title than that derived through it.

It is the province of the court to determine, when evidence is offered, whether it tends to prove the issue. After it has gone to the jury, unless wholly irrelevant, it is for the jury to determine how far it, with other circumstances, conduces to prove the issue.

If there is any evidence whatever, however slight, pertinent to the issue, the court should not take it from the jury and direct their verdict, even if it is satisfied that it would grant a new trial if a verdict should be found upon it.

A verbal promise of a corporation to pay a party's claim, contracted with other parties prior to the incorporation, is void by the statute of frauds, as an undertaking to pay the debt of a third person.

A corporation is bound only by its own contracts, and not by those of the individual members in their private capacity.

The jury can find for the party holding the affirmative of the issue, only when there is a preponderance of testimony in his favor. The degree of preponderance is immaterial, but there must be some, of which they are the judges.

When a suit is upon an aggregate account filed as an exhibit, it is no surprise to the defendant to introduce and prove the bill of items composing the aggregate, though not filed as an exhibit.

A judgment in solido, upon two counts, will be reversed in toto, if erroneous as to one.

APPEAL from Pope Circuit Court.

Hon. R. C. BULLOCK, Special Judge.

This suit was commenced in the Pope Circuit Court, by Perry, against the Little Rock and Fort Smith Railway Company, in May, 1877. The plaintiff's case is best stated by copying the following amended complaint, filed on the 26th September, 1879.

"The plaintiff, J. H. Perry, states that the defendant, the Little Rock and Fort Smith Railway, is indebted to and owes him the just sum of \$8053.77, after all just credits, for work and labor done, materials furnished, supplies advanced, and money laid out and expended by him, on mutual running account with said defendant, from January, 1873, till October 26, 1875, in and about the building and constructing the railroad of said defendant, to wit: the Little Rock and Fort Smith Railroad, from a point on said road known as Perry's Station, to Clarksville, Ark. The items thereof will more fully appear from an account herewith filed, marked Exhibit 'A,' amounting in the aggregate to the sum of \$9823.77, and that he has received \$1770, and no more; but that, after giving all just credits, there remains due and unpaid him thereon the just sum of \$8053.77, with interest thereon from twenty-sixth day of October, 1876, at the rate of six per cent per annum. The plaintiff further states that, by the provisions and conditions of the land grant by the United States to the Little Rock and Fort Smith Railroad Company, unless at least eighty miles of said railroad from the point of beginning had been constructed and completed by the thirteenth day of May, 1873, the right of said Little Rock and Fort Smith Railroad Company to all those lands or sections of land granted to said Little Rock and Fort Smith Railroad Company, in and by the Act of Congress of the United States, approved February 9, 1853, entitled an Act Granting the Right of Way and Making a Grant of Lands to the State of Arkansas, for the use of the Little Rock and Fort Smith Railroad Company, to aid in constructing a railroad from Little Rock to Fort Smith, and by the act of Congress of the United States, approved July 28, 1866, entitled an act to relieve and extend the provisions of the aforesaid act, and for other purposes, would have been forfeited, and the title to the unsold lands included in said grant, to the United States. That, on the first day of January, 1873, said railroad was constructed to what is known as Perry's Station, a distance of sixty miles from the beginning point of said railroad, and on the said first day of January, 1873, the said Little Rock and Fort Smith Railroad Company, being insolvent and unable to complete the construction of said road within time to save their said lands granted to them as aforesaid, the bondholders of said railroad company, to whom the said railroad company had mortgaged their said lands, together with the right of way, privileges and franchises for the sum of five million dollars, to aid said company in the construction of said railroad from Little Rock to Fort Smith, in view of future organization, and to save, unimpaired, their rights to said lands,

under said mortgage, and to prevent a reverter thereof to the United States, took charge of said railroad for the purpose of constructing the same the required number of miles to save and prevent a reverter of the aforesaid lands mortgaged to them to secure the payment of the railroad bonds aforesaid; and between the first of January, 1873, and the thirteenth day of May, same year, said bondholders did, by their mutual and joint efforts, construct said railroad from said Perry's Station to Clarksville, Ark., being a distance of about forty miles, and that the work and labor done, supplies advanced, materials furnished and money laid out and expended by the plaintiff, was, by contract with said bondholders, and at their special instance and request, done in and about the construction of said railroad from Perry's Station to Clarksville, aforesaid. That, afterwards, the said bondholders proceeded against the said Little Rock and Fort Smith Railroad Company and foreclosed their mortgage, as aforesaid; and on the nineteenth day of December, 1874, said bondholders bought, at public auction, the right of way, lands, rolling stock, privileges and corporate franchises of the Little Rock and Fort Smith Railroad Company, and thereby succeeded to all the property, privileges and franchises of said railroad company, and became a duly organized corporation, under the laws of the state, by the name of the Little Rock and Fort Smith Railway, for the purposes of constructing and carrying on the business of railroading from Little Rock to Fort Smith, and have and still continue to operate said road since the nineteenth day of December, 1874. The plaintiff further avers that the bondholders, formerly of the Little Rock and Fort Smith Railroad Company, are the identical and same persons, who became and are now the corporation that compose the defendant, Little Rock and Fort Smith Railway, and who completed the construction of the said railroad from Perry's Station to Clarksville, as aforesaid; and further states that the said corporators of the defendant were, all of them, large stockholders in the Little Rock and Fort Smith Railroad Company, and owned the majority of stock of said railroad company.

"The plaintiff further states that after the defendant had duly organized, as aforesaid, they accepted the results and enjoyed the benefits of his said labor, materials furnished, supplies advanced, and moneys on account, as aforesaid, and agreed to pay him therefor, and on the twenty-sixth day of October, 1876, did pay thereon the sum of \$1770, leaving due and unpaid the sum of \$8053.77, with interest as aforesaid.

II. "The plaintiff further states that the defendant is indebted to and owes him the just sum \$109.20, on account of labor done, materials furnished, advances and money laid out and expended for and in the interest of said defendant, at its special interest and request; the items whereof will more fully appear from an account herewith filed, marked Exhibit 'B,' and that no part thereof has

been paid by the defendant, or any person for him, and that the same is due, with six per cent interest thereon per annum, from September 20, 1877."

Prayer for judgment for debt, cost, and other relief.

EXHIBIT "A."

LITTLE ROCK AND FORT SMITH RAILWAY

In Account with J. H. PERRY.

1873.			
Feb. and March.	To 11,815 cross-ties at 80c.	\$3,894	50
	By cash on same.	270	00
	To balance due on cross-ties	\$3,124	50
June 30.	To building depot at Russellville, Ark.	\$1,600	00
	To running account from January, 1873, to July, same year	4,829	23
		\$6,429	27
	To amount brought forward.	\$9,553	77
1875.			
Oct. 26.	By cash.	\$1,500	00
	Total amount due October 26, 1875	\$8,053	77

EXHIBIT "B."

LITTLE ROCK AND FORT SMITH RAILWAY

To J. H. PERRY, Dr.

1876.			
April 10.	To hauling fruit trees to farm and caring for same.	\$10	00
June 6, 7, 8.	To three days' attendance as a witness at Little Rock.	6	00
	To mileage.	7	50
Sept. 20.	To twenty cords wood at \$2.	40	00
1877.			
Dec.	To wood platform.	28	50
	Total amount.	\$87	00
1875.			
Jan.	Paid Kimball & Perry, amount of overcharge.	23	20
		\$109	20

The defendant answered specifically denying every material allegation in the complaint. Upon the trial before a jury, the plaintiff proved that, "in January, 1873, the Little Rock and Fort Smith Railroad Company had, through means derived from the sale of certain bonds of said company, secured by two mortgages executed by said company before that time, one upon the railroad then completed and to be completed from Little Rock to Fort Smith, and all the rolling stock and personal property appertaining thereto, for the sum of three million five hundred thousand dollars, and the other to secure four millions of dollars of such bonds upon the congressional land grant belonging to said company, completed, or caused to be completed the said railroad from Argenta to Perry's Station, a distance of sixty-five miles, but had failed, become insolvent, and work upon the building of said

road had ceased at that point. That, by provisions of the act of Congress of February 9, 1853, granting said land to said company, and other acts of Congress supplemental thereto, it was required that twenty miles more of said railroad, from Perry's Station mentioned, should be completed by the nineteenth day of May of that year, or in default thereof, such land grant along the line of the road not completed would become forfeited to the United States, and that, unless twenty miles still further west should be built by the nineteenth day of May, 1874, all lands along the line of the road not completed would likewise revert to the government. That certain persons in Boston, who had purchased and were holders of said bonds so secured by the mortgage of said company upon all of said lands, to wit: Elisha Atkins, Benjamin F. Bates and others, entered into an agreement with the president and directors of the said Little Rock and Fort Smith Railroad Company to subscribe and advance sufficient money to complete the said line of road from said Perry's Station to Clarksville, a distance of forty miles, with a view of protecting and increasing the security of the said land mortgage by saving the said land grant from such forfeiture. That said bondholders did subscribe and advance sufficient money so to complete the said road to Clarksville, to wit, the sum of \$50,000 and upwards. That, pursuant to such agreement with said company, and in order that said fund might not be misapplied, but might be faithfully appropriated to the building and completion of said line of road, one George Everett, of Boston, and who was also a holder of said land bonds, was employed and authorized to expend the said money and cause the same to be used and paid out in the work of completing the said line of road. That the said Everett, in performing the said work of completing the road, acted as agent for all parties concerned in the said railroad. That the said Everett, in January, 1873, let the contract for completing the said road to a company composed of S. B. Beaumont, A. P. Curry and W. S. Oliver, who proceeded to lay down the track and complete the said road to Clarksville, and were paid according to the terms of their contract by the said Everett, with money subscribed by the parties in Boston, and during the completion of the said work, the said plaintiff, Perry, who was at that time acting as the agent of the Little Rock and Fort Smith Railroad Company, at Perry's Station, with his own means, built and constructed the depot building and store-house, at Russellville, upon the railway company's right of way, which was built under an agreement with the said Everett that he should be paid for the said building. That said Perry was the owner at that time of eleven thousand three hundred and fifteen cross-ties, which were piled up along the line of said road, and the said Perry entered into an agreement with the said Everett to sell him the said ties at the sum of three thousand three hundred and ninety-four dollars

and fifty cents, which was thirty cents apiece, and the said Everett caused the said ties to be laid down and used in making the track of said road; but the said Everett, though he promised to pay for the said ties, never did pay therefor, except the sum of two hundred and seventy dollars, leaving a balance due of three thousand one hundred and twenty-four dollars and fifty cents." And thereupon the plaintiff, to prove the item of four thousand eight hundred and twenty-nine dollars and twenty-seven cents in his bill of particulars, exhibited with his complaint, produced in court his bill of particulars, comprising a running account amounting in the aggregate to that sum, and offered to read the same in evidence.

The account is long, containing a great many items, and is not necessary to be inserted here. The defendant objected to its being proven and read as evidence on the ground, "that the said defendant was taken by surprise thereby, the same never having been filed in the cause nor exhibited to defendant;" but the court overruled the objection and permitted the same to go as evidence to the jury. The plaintiff then proved, by his own evidence, "that the supplies, material, and money mentioned in the said bill of particulars were received by Everett, and he (Everett) agreed to pay the same, but had failed to do so. That the said amount exhibited with his complaint, comprising the items of \$3124.50 for ties and \$1600 for building depot at Russellville—\$4829.27 the aggregate of said running account, was a just claim against the said Everett, was contracted by him, and he agreed to pay the same, but never did pay it or any part of it. Said Perry said to the said Everett, at the time said debts were contracted, that he would not advance ties and material to the Little Rock and Fort Smith R. R. Co., because the company was insolvent and had failed to pay him a debt they already owed him, and that said Everett represented to him that it was not the Fort Smith and Little Rock R. R. Co. that was doing the work; that said Everett represented the bondholders of said company, and they (the bondholders) were furnishing the money to do the said work, and were completing the said road to Clarksville in order to save the land grant to said road, without which the said bondholders had no interest in Arkansas, and that they (the bondholders) were doing so with a view of taking charge of the road themselves;" and thereupon it was admitted by the parties "that the bondholders of the Little Rock and Fort Smith R. R. Co., in April, 1874, caused bills in Chancery for the foreclosure of the mortgages on said road and lands to be filed in the Circuit Court of the United States for the Eastern District of Arkansas, at Little Rock, and that on the sixteenth day of November in that year decrees were rendered in that court foreclosing said mortgages and ordering a sale of the whole of said mortgaged property; such sale to take place at the door of the courthouse of said United States Court, in Little Rock, on the tenth day of December, 1874.

That such sale was made accordingly, and the property was sold to the highest bidder, for cash in hand. That the property was purchased by one George O. Shattuch, Francis H. Weld, and George Ripley, as the agents and attorneys of persons holding a majority in value of the road and land bonds of the said railroad company, and such purchase was made for the benefit of all the bondholders who should, within one year, surrender their bonds and take stock therefor in a new company to be formed, under the provisions of the general railroad law of Arkansas, and of an act of the Legislature of Arkansas, supplementary thereto, approved the ninth day of December, 1874. That, on the nineteenth day of December, 1874, the said purchasers, and their associates, did organize themselves into a new joint stock company for the purpose of owning, completing, and operating the said railroad, so purchased, in pursuance of the provisions of the general railroad law, as amended by the said act of ninth of December, 1874, under the name and style of the Little Rock and Fort Smith Ry., which is the defendant. That said company was incorporated on the nineteenth day of December, 1874, and never had any existence previous to that time. That, on the organization of said company, all the property so purchased under the decree foreclosing the said mortgages, was converted into stock at an estimated value, and such stock was put upon the market for sale. That a large majority, though not all of the holders of the railroad and land bonds secured by the said mortgages, did afterwards surrender their bonds to said company, and did receive in lieu thereof stock in the new company, and thereby became stockholders in said company and part owners of the said railroad and lands formerly belonging to the Little Rock and Fort Smith R. R. Co., and many of whom still continue to be said stockholders and owners. That after said Little Rock and Fort Smith R. R. was purchased by said bondholders, those who had furnished the means to build said road-bed from Perry's Station to Clarksville, in 1873, were reimbursed in bonds of the new company for such advances. And thereupon, the plaintiff further testifies, as a witness, that he had at divers times presented his said claim to Elisha Atkins, who was a large bondholder of the old company, and to other bondholders who have since become stockholders in the defendant company, when they were here from Boston, and urged upon them to pay his said claim, or to make some provision for the settlement thereof, and they had promised to do so, but had failed. That after the organization of the defendant company, he presented the claim to Joseph H. Converse, the President of the company, and he verbally promised to pay the same or have the same settled in some way, but kept putting him off from time to time until at last the said Converse, representing that the stock of the defendant company was, or would be, worth dollar for dollar in the market, he did agree with the said Converse to take \$1500

in cash and \$5500 in the stock of defendant company, and said Converse did pay him the sum \$1500 cash and draw an order upon the Treasurer of said company, in Boston, for the stock, which he accepted. That this settlement was to be in full for all claims which he (plaintiff) had or held against the defendant company, or the Little Rock and Fort Smith R. R. Co., or any of the bondholders thereof; and the plaintiff, upon the receipt of such order for stock, gave said Converse a receipt in full against all such claims, but that, finding that such stock was not worth dollar for dollar, but was worthless, or nearly so, he applied to said Converse to have said agreement rescinded, so far as the payment of the stock was concerned, and that part of the agreement was rescinded, and the papers so given were returned to the parties respectively, and the said Converse has ever since failed and refused to pay anything. That the \$1500 cash payment was not rescinded, because it was the amount which plaintiff had agreed to take for the depot house and the depot house was given up upon such payment being made."

The plaintiff then proved that the items of his account stated in the second paragraph of his complaint were correct.

Among the instructions, given by the Court to the jury for the plaintiff, were the following, to which the defendant objected:

"First—If the jury find, from the evidence, that the bondholders of the Little Rock and Fort Smith R. R. Co., or any number of them constituting a majority of the defendants, according to the amount of stock in value, by themselves or their agents, duly authorized, contracted with the plaintiff for the materials and supplies, as claimed in the first count of plaintiff's complaint, with a view of organizing themselves into a company, and did afterwards organize themselves into what is now the Little Rock and Fort Smith Ry., the defendant, and that the plaintiff did furnish the same under said contract, the defendant thereby became liable to the amount thereof so furnished, and that the defendant accepted the same by themselves or by agents, and enjoy the benefits thereof, they will find for the plaintiff the amount they may find to be due therefor.

"Second—If the jury believe, from the evidence, that the defendant, the Little Rock and Fort Smith Ry., subsequent to its organization, accepted the results and enjoyed the benefits of the advances, supplies and materials furnished by the plaintiff, as charged in the first paragraph of the complaint, and promised to pay therefor, they will find for the plaintiff."

For the defendant the court gave the first and tenth of the following instructions, and refused the others:

"First—That the defendant, the Little Rock and Fort Smith Railway, is a different person in law and fact from that of the Little Rock and Fort Smith Railroad Company, nor liable in any manner

for its debts by virtue of its organization, nor by virtue of its having purchased the property formerly owned by that company, under decree of Chancery, foreclosing a mortgage executed by that company; that such debts are debts of a third person, as to this defendant company, and to authorize the jury to find against the defendant upon such debts it must be proved that the defendant assumed to pay such debts by a contract valid in law for that purpose.

"Second—That the defendant company is also a different person in law and fact from the bondholders or stockholders of the Little Rock and Fort Smith Railroad Company, or from its bondholders or stockholders either individually or collectively, and cannot be made liable for any debts or undertakings of any such bondholders or stockholders, except by a valid contract for that purpose by the company after its incorporation.

"Third—That under the law of its incorporation defendant company is wholly incapable of binding itself or becoming obligated to pay the debts of third persons, except by resolution of its board of directors or the resolution of a stockholders' meeting in regular session; that neither the president nor any of its officers has individually and separately any power to make any contract binding upon the company for the payments of any such collateral debts.

"Fourth—That unless the jury find from the evidence that the plaintiff's cause of action was originally contracted with defendant company, they will find for the defendant, unless they further find that the defendant company assumed to pay the same by a resolution of its board of directors, or by a resolution of a regular stockholders' meeting.

"Fifth—That evidence showing that the plaintiff's cause of action was originally contracted with the Little Rock and Fort Smith Railroad Company, or by any and all persons holding the bonds of said company, secured by mortgage upon all the property of said company previous to the incorporation of the defendant company, and with the view of protecting or increasing their mortgage security by saving the land grant, is not evidence tending to show any obligation or liability on the part of defendant company to pay such claim, nor does evidence tending to show that the president or other officers of said defendant company verbally undertook or promised to assume and pay such claim, tend to prove an obligation or liability on the part of said defendant to pay such claim, and the jury will disregard all such evidence as immaterial.

"Sixth—That there is not evidence, sufficient in law, to sustain a verdict for the plaintiff upon the first count or paragraph of the plaintiff's amended complaint, filed on the twenty-sixth of September, 1879, and the jury must find for the defendant upon that paragraph or count.

"Seventh—That if the jury believe, from the evidence, that the defendant company, by its president or other officer, did verbally agree to pay the plaintiff's claim, contracted, with other parties prior to the incorporation of said company, such verbal agreement or promise is void by the Statute of Frauds, as an undertaking to pay the debt of a third person, and the jury must find accordingly.

"Eighth—The jury are instructed that the defendant, the Little Rock and Fort Smith Railway, being an incorporation duly organized under the general incorporation laws of the State of Arkansas, is capable of contracting and being contracted with; and in order to hold the said defendant liable on a contract, it must appear that the contract was made with the said defendant incorporation, and not with the individual members of said incorporation in their private capacity; and in order to hold this incorporation—the defendants in this action—liable for the contracts of the members thereof, made in their individual or private capacity, before said incorporation was organized, it must appear that the said incorporation, after its organization, agreed and promised to carry out and perform said contract.

"Ninth—The jury are instructed that they will find the issues in favor of the parties producing the preponderance of proof, and that the onus probandi, or burden of proof, is on the plaintiff, and therefore the plaintiff must produce the greater weight of evidence before the jury can find in his favor.

"Tenth—The jury, in determining the weight of the evidence, will take into consideration the interest the witnesses have in the suit, as well as their manner of testifying."

The jury found for the plaintiff. The defendant filed a motion for new trial, because: 1st. The verdict was contrary to law and the evidence. 2nd. Not warranted by the allegations of the complaint. 3rd. The defendant was taken by surprise in the admission as evidence of a bill of particulars, of which he had no notice. 4th. Error in giving and refusing instructions by the court.

The motion was overruled. The defendant then filed its bill of exceptions, and appealed.

Clark & Williams, for appellant:

This case does not come within the principle that a corporation is bound by contracts made with the promoters or getters-up of the company previous to its charter or organization, when such contract is in behalf of the company and inures to its benefit. *Edwards v. R. R. Co.*, 1 Mylne & Craig, 650; *Vauxhall Bridge Co. v. Earl Spencer*, Jacob, 64; *Gooding v. R. Co.*, 15 Eng., L. & Eq. 596; *Preston v. Railway Co.*, 7 Eng. L. Eq. 124; *Hawks v. Railway*, 15 Eng. L. & Eq. 358, S. C.; *Whitman v. Wyman*, S. C., U. S. 10 Cent. Law Journal, 476; 1st *Redfield on Railways*, sec. 5, p. 16. These cases show that to make the corporation liable, a valuable consideration should have passed to the promoters; the

contract should be intended to inure to the benefit of the proposed corporation, and that the corporation receive the benefit of the contract. An obvious corollary of this is, that the parties contracting should be the promoters of the corporation sought to be made liable, and that the corporation should be afterwards chartered. But there was already a corporation in existence who owned the road, and the contract was designed to and did inure to the benefit of that company.

Even if the bondholders did make the contract, and did afterwards organize and take possession, the appellant would not be liable, unless such subsequent organization and possession was in some manner the effect of the contract; but Everett could not bind the bondholders by merely assuming to be their agent. See *Carter v. Burnham*, 31 Ark. 212; *Campbell v. Hastings*, 29 Ark. 512.

The link is wanting to establish that the contract was one promoting such organization.

When there is no evidence to sustain a verdict, or when there is some evidence, thought not sufficient to sustain the verdict without a shock to our sense of justice, the court should instruct as in case of non-suit. We refer to authorities cited in our briefs in *L. R. and F. S. R. Co. v. Owen Duffie*, and same *v. Parkhurst*, and to *Oliver v. The State*, MS. op., this court.

The company was incapable, in law, of binding itself to pay the debts of third persons, except by resolutions of its board of directors, or a meeting of stockholders, and a verbal promise of its president was void, as within the Statutes of Fraud. The payment of debts of third persons is *ultra vires*. *State Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Smeed v. Indianapolis R. R. Co.*, 11 Ind. 144; *Bank of Genessee v. Patchin*, 3 Kern., 13 N. Y. 309; *Angel & Ames on Corp.* 256, 258.

No copy of the account, i.e., a copy of the items, the particulars of the account, was filed as required by sec. 4599 of Gantt's Digest, and the defendant was taken by surprise.

Under the common law a plaintiff could not state that defendant was indebted to him in a running account, and then be permitted to prove any items he pleased. Such a complaint is subject to demurrer; evidence under it may be objected to, or judgment arrested. The rule is the same under our Code. *Newman Pl. and Pr.* pp. 258, 266, 659; *Clark v. Finnell*, 16 B. Mon. 355; *Francis v. Francis*, 18 B. Mon. 27; *Fible v. Caplinger*, 13 B. Mon. 465; *Higgins v. Freeman*, 2 Duer, 65; *Burnham v. DeBoisse*, 8 How. 159; *Hentsch v. Porter*, 10 Cal. 555; *Ivany v. Carlien*, 30 Mo. 142; *Masters v. Freeman*, 17 Ohio St. 323.

U. M. Rose, for appellee.

The English authorities, without exception, concur in supporting the rule, that the contracts of the projectors of a corporation,

when the benefits of them are accepted by the company after its organization, are binding upon the corporation. *Edwards v. Grand Junction R. R.*, 1 Mylne & Craig, 650; *Preston v. Liverpool R. Co.*, 7 Eng. L. and Eq. 124; 1 *Simons N. S.* 586; *Stanley*, 2 C. & B. R. Co., 9 *Simons*, 264; *Webb v. D. L. & P. Railway*, 9 *Hare*, 129.

If this cause should have been in Chancery, the error is waived by acquiescence of parties. *Gantt's Digest*, secs. 4461, 4463, and 4464; *Talbott v. Wilkins*, 31 *Ark.* 411. Besides the American cases held that the liability exists equally at law and in equity. 1 *Redfield on Railways*, p. 16, sec. 5; *Field on Corp.* sec. 221; the leading American case of *Low v. C. & P. Rivers R'way*, 45 *N. H.* 375; reported also 1 *Redfield Amer. Railway cases*, p. 1; *Catawissa R. R. Co. v. Titus*, 49 *Penn. St.* 277.

In *Grape Sugar Co. v. Small*, 40 *Md.* 395, the corporation was held to be estopped from denying its liability, even though it did not appear that the company had authority to make such contract, and in *Whitney v. Wyman*, 101 *U. S.* (11 *Otto.*) 392, it was held that where the projectors of a corporation which had no power to do business, being incomplete, purchased machinery, afterwards used by the company, the corporation was liable.

Hall v. Vt. and Mass. R. R., 28 *Vt.* 401, is sometimes cited against us, but is, in reality, strongly in our favor. There the services were rendered gratuitously, merely in expectancy that the building of the road would enhance property, etc., but the company was held liable for services rendered in procuring stock subscriptions necessary to its organization. *Episcopal C. Society v. Episcopal Church*, 1 *Pick.* 371.

The defendant is liable on the contract, though made on its behalf by an unauthorized agent, having ratified it by receiving the benefits.

It is insisted that the president had no right or authority to ratify the contract, but *omnia presumuntur rite et solemniter esse acta*, and it devolved on defendant to prove the want of power. The board of directors must have been informed of the payment by its president of the \$1500.00 to Perry, and since they in no way objected, they ratified his action. *New Hope and D. Bridge Co. v. Phenix Bk.*, 3 *Comst.* 156; *Sherman v. Fitch*, 98 *Mass.* 59.

Where one has actual charge and management of the general business of a corporation, with the knowledge of its directors, the corporation is bound by his contracts, made on its behalf, in the course of the business, without other evidence of actual authority. *Goodwin v. Union Screw Co.*, 34 *N. H.* 378.

Having received the benefit of the contract, the company is estopped to deny that Everett was its agent, and liable. *Field on Corp.*, sec. 194; *Foster v. LaRue*, 15 *Barb.* 323; *Moss v. Rossir*

L. M. Co., 5 Hill, 137; Merchants' Bk. v. Central Bank, 1 Kelly, Ga. 428; Abbott v. School Dist., 7 Greenl. 96; Perry v. Simpson W. Co., 37 Conn. 534; Gooday v. C. & S. V. R. Co., 15 Eng. L. and Eq., 598-9.

As to the liability of corporations on contracts of unauthorized agents subsequently ratified, see further, Hooker v. Eagle Bk., 30 N. Y. 36; Angel & Ames on Corp., sec. 304; Fleckner v. Bank U. S., 8 Wheat. 363; Hoyt v. Thompson, 19 N. Y. 218-19; Peterson v. Mayor, 17 N. Y. 453-4; Bank U. S. v. Dandridge, 12 Wheat. 64; Hayward v. Pilgrim Society, 21 Pick. 270; Stuart v. L. & N. R. R., 10 Eng. L. and Eq., 63; Renter v. Elec. Tel. Co., 37 Eng. L. and Eq. 189; School Dist. v. Richardson, 23 Pick. 70; Conso v. P. H. I. Co. 12 Barb. 53.

A new trial will not be granted on the ground of surprise unless the motion is supported by affidavit. Sec. 4691 Gantt's Dig.; and the party seeking must show surprise "which ordinary prudence could not have guarded against." Gantt's Dig., sec. 4688.

Defendant not having moved for a more specific statement of the account, which it could have procured at any time, waived it.

EAKIN, J.—The complaint is intended to set forth a cause of action at law, for services rendered, material furnished, money expended, etc., by Perry, for and in behalf of the defendant railway company, for which it afterwards promised to pay. The promise is the gist of the action, and its denial makes an issue exclusively cognizable at law. The history and circumstances of the transaction are set forth in the first paragraph of the complaint, not as grounds upon which the plaintiff directly seeks equitable relief, but, rather, to show the consideration of the promise, the inducement thereto, and the facts from which a promise might be implied. It cannot be said, from the face of the complaint, that the plaintiff "should have adopted proceedings in equity," which would have authorized the defendant, under sec. 4464 of Gantt's Digest (second clause), to move for a transfer. Nothing was waived by failure to make such motion, and the defendant has the right to insist that the plaintiff shall stand on the ground he has chosen, and succeed upon such principles alone as are cognizable at law.

Perhaps the most perplexing questions, and least satisfactory decisions (not always in harmony with each other), which have sprung from the inauguration of the so-called system of American procedure, regard the kind and measure of relief which may be afforded in cases where the proof elicited under one mode of proceeding, reveals matter relievable under the other. This is especially the case in the few states which, like Kentucky and Arkansas, have adopted the Code system generally, with the interpolation of an effort still to preserve the distinction between proceedings at law and in equity. It is very hard to do that without separate

Courts of Chancery, in the face of an express provision that an error as to the kind of proceedings shall not cause an abatement or dismissal of the action. Still, it is the duty of the courts to make the effort, and preserve the distinction, so far as they may be able, in harmony with all parts of the Code.

The decisions in those states are, as yet, few, and no set of rules can be formulated from them, entirely satisfactory to the profession; but in our state it is now settled that relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law. This has been illustrated in a striking manner, with regard to mortgages of property, not in esse. They have been treated in actions at law as wholly void, but have been sustained in equitable proceedings. See *Apperson v. Moore*, 30 Ark. 56; *Tomlinson v. Greenfield*, 31 Ark. 557; *Roberts v. Jacks*, *Ib.*, 597. The case of *Talbot et al. v. Wilkins et al.*, 31st Ark. 411, is not in conflict with this ruling. The Court expressly held that the case being at law to enforce subrogation, a purely equitable right, the defendants might have moved to have the action changed to equitable proceedings, and that the error was waived by neglect to do so. This does not apply to a case properly brought at law, in which no such motion could be sustained. It is unreasonable that a defendant should be held to a court of law by the allegations of the complaint and be there subjected to the administration of principles purely equitable; but if he has an opportunity to have the change effected and neglects it, he should not complain. Even this practice has not, in all cases, been allowed; but the rule has been so modified as to prevent parties, by consent, from indulging in such proceedings as would, if common, entirely obliterate the distinction between law and equity; and a special proceeding at law, founded upon common law or statute, cannot be made, even without objection, to subserve the purposes of a bill in equity. In such plain and palpable cases of perversion of remedies, it is the duty of the Circuit Judge to interfere and refuse relief, unless the complainant shall approach the court in proper fashion. Thus it was held in *Crawford, Auditor, v. Carson (Ex.) et al.*, 35 *Ib.*, Ark. 565, which was an effort to make the writ of mandamus serve the purposes of an injunction, that "it is the duty of the courts in clear cases, where the entertainment of a writ in the form presented, would lead to a confusion of the boundaries between proceedings at law and in equity, and between ordinary actions and special proceedings, to refuse of their own motion to do so." That case rested upon its peculiar nature. In ordinary civil actions it may now be considered as the settled rule of this court to be observed hereafter, that actions of a purely equitable nature and so appearing by the complaint, when brought at law, may be transferred to the equity side on motion of either party, or by the court on its own motion, by virtue of its inherent power over its pro-

ceedings and that the courts should be free in the exercise of that power to sustain the legislative intent in retaining the distinction, amidst the wreck of all forms of action; but that the failure to do, so, without a motion by parties for the purpose, is not error for reversal.

With regard to actions begun in Chancery, which upon their face appear to be exclusively and wholly cognizable at law, as, for instance, a bill to obtain judgment upon a note, or an ejectment bill without equitable elements, the rule is the same. It is always, however, to be borne in mind that if there be any equitable element to which the jurisdiction of a Court of Chancery may attach, then by the old doctrine, the court in the same proceedings may administer all legal relief connected with the subject-matter and essential to do full and complete justice at once to all parties before it.

But when, as in this case, the action is purely legal upon its face, and properly brought at law, it must be decided on legal principles alone. It follows that the plaintiff cannot be sustained in his judgment, unless he has shown, by evidence, either an express promise of the defendant railway company, valid in law, to pay his claim, or circumstances from which, according to legal principles, a promise may be implied.

The plaintiff relied, and the court below seems to have acted upon, a principle which grew up in the English Courts of Equity, as an Equity doctrine; and which, like the vendor's lien, contravening the strict rules of law, was adopted, *ex æquo et bono*, to prevent fraud and imposition, and do substantial justice. It amounted to this: That where the formation of a corporation was in contemplation, and the promoters of the corporation were taking initiatory steps to perfect its organization, and obtain a charter, and provide in advance the means necessary for its successful operation, all contracts made by such promoters, for the benefit of the future corporation, and which were reasonable and proper to put it in operation, and the benefits of which were afterwards accepted by the corporation, became binding on the corporation without any formal contract to pay.

A brief notice of some of the cases cited by the attorney for the appellee, will render the nature and scope of the doctrine more intelligible.

The leading case is that of *Edwards v. The Grand Junction Railway Company*; 1st Mylne & Craig, 650. The promoters of the railway had a bill pending in Parliament for their incorporation, which had passed the Commons and gone to the House of Lords. In the latter house the trustees of a certain turnpike road, whose line would be crossed, had prepared and were about to present a petition in opposition to the bill. After some negotiations between the committees on behalf of the projectors and the trus-

tees of the turnpike, it was agreed between them that the latter should withdraw their opposition to the bill in consideration that the railroad crossing should be carried under the turnpike by constructing a bridge for the road of a certain agreed width and structure. It was desired by the turnpike trustees that these conditions should be made provisions of the charter, but as the amendment would have involved new delays in the then advanced state of the bill, the trustees were induced to waive this demand by the written undertaking of one of the promoters in behalf of all, to execute an agreement to the effect of the desired clauses, and to have the same confirmed by the company as soon as circumstances should permit. The bill was allowed to pass, which provided for crossings of any turnpike roads by bridges of a less width. The railway company was proceeding to construct a bridge at the crossing of the turnpike of complainants as authorized by the charter, but of less width than had been stipulated in the compromise. The turnpike trustee applied for an injunction, which was granted. Upon a motion before the Lord Chancellor to dissolve, he held in effect that conceding there was no legal liability on the company, on account of a contract made before its existence, yet there was an equity binding it not to use its chartered power, obtained through and by means of such an agreement with the proprietors, who were pressing the bill in violation of its terms. The injunction was continued. This is a case where the agreement was made expressly for the benefit of the company, and under a pledge that the company when organized would carry it into effect.

The case of *Stanley v. Birkenhead Ry. Co.*, 9 Simons, 264 (reported in 16 Eng. Ch. Rep'ts., 264) was one in which the projectors of a railroad, seeking a charter and fixing their line, agreed with a landed proprietor, on behalf of the proposed company, in consideration that he would withdraw his opposition to their bill, to pay him £20,000 for the portion of his estate required by the road.

A bill for specific performance was brought against the company, after its complete organization, or, rather, against the company whose projectors had expressly adopted the agreement, and there was a demurrer for want of equity. The Vice-Chancellor held that the case was a very simple one; that the company was bound by the equity; and overruled the demurrer. In this case, as in the former, it appears that there was an existing organization for the purpose of promoting the railroad, and that the contract was made in the course of preliminary proceedings, necessary to obtain the franchises, and put the road into operation.

The cases of *Preston v. The Liverpool, Manchester, etc., Ry. Co.*, 7 Eng. L. & Eq., 124; and *Webb v. The Direct London & Portsmouth Ry. Co.*, 9 Hare., 129, are of similar import. Whilst the equity is, in all of them, readily acknowledged, under the cir-

cumstances, they are all cases where the projectors were acting under a preliminary organization to obtain charters and perfect the scheme, and the contracts, though made with the projectors, were properly on behalf of the intended companies, and with the view entertained by both parties, at the time, of having them adopted by the companies, when perfected and empowered to do so. The equity is based upon the ground that, under such circumstances, it would be a fraud upon the vendor, or the person withdrawing an opposition, if the company, which had thus been pledged in advance by its creators, and obtained its franchises through such pledges, should be allowed to violate them. None of the cases go to the extent of holding that any and all contracts made with the projectors of a road, upon their individual responsibility, and without any mutual expectation that they would form a company which would assume the contract, would nevertheless be binding on a company if the persons bound should afterwards organize themselves into a corporation and put into it the property acquired, or the results of the services rendered. Such a ruling would destroy all distinction between the liabilities of corporations, and those of its individual members, and it may be added, that so wide and sweeping an equity would be very apt to deter any new subscriptions of stock under any charter. Of course there is no question but that liens upon property, in the hands of individuals, would be followed into the hands of a corporation which they might organize, and enforced against it, but that is not now the question.

The rule has been freely adopted in the American courts, upon the English authorities, and with the same limitations. The rule is thus defined by Mr. Redfield in his work on the Law of Railways, vol. 1, p. 16: "Whenever a third party enters into a contract with the promoters of a railway which is intended to inure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it, upon the familiar principle that one who adopts the benefit of an act which another volunteers to perform in his name, and on his behalf, is bound to take the burden with the benefit." This is a very well formulated expression of the rule, and on all points carefully guarded to conform with the decided cases, and limit its scope. It has also in some cases been held in America that a corporation is liable at law, upon an implied assumpsit, for services rendered before it came in esse, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed. See *Low v. Ct. & Passumptric Ry.*, 45 N. H. 375, which was a suit for services rendered in procuring stock-subscriptions. This is certainly reasonable with regard to services rendered for the direct object of perfecting the organization.

From all the authorities, it seems clear that, in order to recover, in an action at law, the plaintiff must show either an express prom-

ise of the new company, or, that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of a plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. From these circumstances an affirmance would be implied. Whether equities might arise under other circumstances is a matter to be considered when duly presented in a Chancery case. No authorities have gone the length of holding that any contract made with individuals, exclusively upon individual credit, will become the contract of any future corporation they may form, for the more convenient management and use of the benefits of it.

The verdict in this case seems justified, under the instructions, and saves comment on the evidence. We will consider the instructions in the light of the principles above announced.

The first and second instructions given for the plaintiff were given against the objections of the defendant. It is apparent that the first widens the liability of defendant much beyond the adjudged cases, and beyond any safe principle. It cannot be contended upon any authority, for instance, that if a number of gentlemen, with a view, amongst themselves, of organizing a corporation in the future, should buy property, and have labor done upon it, upon their individual responsibility, and should afterwards form a company and take stock for their respective shares, the vendor or laborers would thereby, in the absence of a lien, have the legal right, by virtue of a supposed assumpsit, to impose the obligation of payment on the artificial person, the corporation. This would be unreasonable. The corporation having given stock for the property, as well as stock to other subscribers (if any), for money paid in, would have the right to proceed unincumbered. It stands distinct from the component members, a person of itself. The creditors having no liens would have suffered no injury. They are left with the legal rights against the individuals upon which they at first reposed, and in enforcing them may, by proper process, even reach the stock given for the property. Other elements are necessary in this action. It should appear that the view of future organization was mutual between the contracting parties, and that the labor, material, etc., were furnished at the time on behalf of the future company, with the view, authorized by the assurances of the projectors, that the company when chartered would assume the debt, as created in its behalf. In such case only would the acceptance of benefits of the contract amount to a ratification, and implied promises at law, although there still might arise an obligation on a promise expressed and accepted.

The first instruction was erroneous and misleading. The second does not appear objectionable.

All the instructions asked by defendant were refused except the first and tenth. The first referred to the debts of the old company, and had little application; as the evidence is positive that the credit was not given to it, but exclusively to the bondholders. The tenth is a general truism.

The second should have been given. It is a clear statement of the law, considering that the contract may be expressed or implied.

The third and fourth would have been misleading, and were properly refused. Corporations may incur legal liabilities from conduct, as above indicated.

The fifth would have been improper. Whether evidence tends to prove an issue may, on objection, be determined by the court when offered. After it has gone to the jury, unless wholly irrelevant, it is the province of the jury to weigh it and determine how far it, with other circumstances, conduces to prove the issue.

The sixth has been held improper by this Court, under our Constitution, and we adhere to the former rulings. If there is any evidence whatever, however slight, pertinent to the issue, it should not be taken from the jury, even if the court is satisfied that it would grant a new trial, if a verdict were found upon it. The learned counsel for the appellant press this point in their brief with much force, upon the practice at common law, in the Federal Courts, and in the courts of other states. We think the positive injunctions of the State Constitution, however, settle the matter here: "Judges shall not charge juries with regard to matter of fact, but shall declare the law." Art. VII., sec. 23. If the juries abuse this power, there may be a new trial; but that is quite different in its consequences from a direction for a verdict.

The seventh would have been misleading, perhaps, although literally correct, as an abstract proposition. Under the circumstances it might have diverted the attention of the jury from the possible implied contract by conduct, and by use of the benefits of a contract. The refusal was not error. It would have been better, however, to have qualified it by the insertion of "if there be no other sufficient evidence of an implied or express promise," or words to that effect.

The eighth, although strictly correct, was subject to the same qualification, and might, as worded, have misled. It tended to divert the minds of the jury from the obligation of the company, which might attach, from circumstances as explained above, and might have led them to suppose that an express assumpsit was necessary. It would have been better to have inserted or added, "either by express promise, or one to be implied in law."

The ninth instruction asked was clearly proper, and its refusal

erroneous. It is certainly the duty of the party having the onus to produce a preponderance of proof; otherwise, matters should stand as they are. The degree of preponderance is immaterial, but there must be some, of which the jury should judge.

There was no error in refusing a new trial on the ground of surprise. The defendant might have called for a bill of particulars.

As to the second count in the complaint no error is claimed, but the judgment being in solido must be reversed.

On the return of the cause the plaintiff, if so advised, may proceed upon the second count alone, and dismiss as to the first, with a view of filing a bill in equity as to the matters therein, or he may have a new trial on the whole at law.

Reverse for the errors indicated, in overruling the motion for a new trial, and remand the cause for further proceedings, in accordance with law and this opinion.

The doctrines with relation to the liability of corporations for services rendered prior to their corporate existence and incorporation are, it is believed, substantially similar in England and the United States, although there are some authorities in this country tending the other way, in England the doctrine chiefly stated is that where the promoters of a company enter into a contract for the benefit of and with reference to the intended corporation, and said corporation accepts the benefits accruing from said contract, it is bound by the terms thereof. *Edwards v. Grand Junction Railway Co.*, 1 Mylne. & Co. 650; *Stanley v. Birkenhead Ry. Co.*, 9 Simons, 264; *Preston v. Liverpool, Manchester, etc., R. Co.*, 7 Eng. L. & Eq. 124; *Weld v. Direct London & Portsmouth Ry. Co.*, 9 How. 129. The law is stated to a similar effect in—*Coyote Gold & Silver Mining Co. v. Ruble*, 8 Oregon, 284. A similar doctrine is laid down in *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 59, where, however, it appeared that the contract was not entered into by a majority of the promoters and that the corporation when formed had not adopted the plaintiff's work. The following are the observations of the court in this case as to the matter in hand:

"We do not desire to controvert the principle, established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts on behalf of a body not existing at the time, but to be called into existence afterwards, then if one body for whom the projectors assumed to act does come into existence, it cannot take the benefit of one contract without performing that part of it which the projectors undertook that it should perform. Conceding to this principle its full force and effect, we are unable to see its application to the facts of this case. It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with one intent, to procure a charter in the furtherance of their designs, they may authorize certain acts to be done by one or more of that number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits cum onere and make compensations therefor. But the projectors or promoters of the enterprise within the meaning of this rule referred to evidently must be a majority at least of such persons, and not one, two or three, or a small minority thereof. Such minority can have no more authority to bind one association or corporation in its incipient or inchoate condition that they would have to bind it

if fully organized. In this case the two or more persons who, it is alleged, promised the plaintiff to see him paid, bound no one but themselves. They had no authority to speak for any one else. In the absence of any such authority and of any satisfactory proof that the result of the plaintiff's labor and expenditure was accepted and enjoyed by the corporation, . . . the court below should have instructed the jury that the defendant was not liable."

Where there is an express adoption by the corporation of the contract, amounting to a ratification thereof, no room remains for doubt as to its liability.

Bell's Gap R. Co. v. Christy, 79 Pa. St. 59; *Titus et al. v. Catawissa Railroad Co.*, 5 Phila. 172; *Wood v. Whelon*, 93 Ill. 153; *Low v. Connecticut and Passumpsic R. Co.*, 45 N. H. 370, S. C. 46 N. H. 284.

Some authorities go further, and hold that even in the absence of an express contract with the promoters the corporation adopting the benefit of a party's acts is liable to him on an implied assumpsit for services rendered. *Law v. Conn. & Pass. R. Co. supra*.

At least, if the services be after the granting of the charter and of such a kind as are necessary to enable the corporation to organize. *Hall v. Vt. & Mass. R. R. Co.*, 28 Vt. 401.

And in such case the existence of a provision in the charter that certain expenses shall be paid does not preclude liability for further expenses other than those named. *Law v. Connecticut & Pass. R. Co.*, 46 N. H. 284.

Some authorities hold doctrines directly the contrary of those above set forth. In *New York & New Haven R. R. Co. v. Ketchum*, 27 Conn. 170; it is said that promoters cannot bind the company before incorporation thereof in any event.

In considering this case the court said: "The services for which it is claimed that the plaintiffs were liable to pay the defendant, were rendered at a time before the stock was taken up, in conformity to the charter, and before the company had a proper existence. Hence it is not easy to see how they could be rendered for or at the request of one company (or rather, perhaps, the first bona fide stockholders, for they must be looked at as the company) and if they were not so rendered, then how the company could be liable for them, upon any known principle of law. We are aware that it is no uncommon practice for corporations to assume and pay every preliminary and antecedent charge after the company has become organized, but we do not see how the company, if it should object, could be compelled to pay them, and in some cases it would be most inequitable to require it. Can a few persons combine for their own interest to get up a railroad, agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company, and privately make this commission or bonus a charge on the corporation when formed? This would be a breach of faith towards honest and unsuspecting stockholders who pay the charter price for their stock and expect to take it clear of all incumbrances."

These observations must, however, in view of the facts of the case be considered as mere dicta. The facts were as follows: A director of a railroad had prior to its incorporation performed valuable services in collecting subscriptions. On the organization of the road the company voted him a free pass for himself and his family, which was subsequently withdrawn. The question of the obligation of the corporation to him arose in an action against him for fares. The court pointed out clearly the fact that there was no evidence to show that defendant had performed the services in question on a footing of compensation or that the ticket was anything else than a gratuity, and the case might well have been decided on these grounds. The court, however, chose to submit the further considerations cited above.

It is evident that where the services preformed are purely voluntary or have been prompted by some self interest, such as an expected value, in the use of the parties' real estate by the formation of the company and construction of the road, he is entitled to no compensation. *Hall v. Vt. & Mass. R. R. Co.*, 28 Vt. 401.

The presumption that the services have been voluntarily rendered is a very strong one. *Rockford R. L., 7 St. L. R. R. Co. v. Sage*, 65 Ill. 328. In this case the court said:

"For services and expenses before the organization of the company, which subsequently the company accepts and receives the benefits of, and promises to pay for, we will not say a party might not recover by virtue of such express promise, but we are disposed to deny the right of recovery for such services and expenses upon any implied promise resulting from the facts . . . A right of recovery against a corporation for anything done before it had a proper existence, does not appear to rest on any very satisfactory legal principles. It appears more reasonable to hold any services performed or expenses incurred prior to the organization of a corporation to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation. It seems unjust to stockholders who subscribe and pay for stock in a company, that their property should be subject to the incumbrance of such claims, and which they had no voice in creating."

STATE, EX RELATIONE THOMPSON,

v.

THE CHERAW AND CHESTER RAILROAD COMPANY.

(16 *Shand. Reports*, 524.)

The terms "stock" and "capital stock" considered, and held, that stock when used in reference to corporations, and in connection with the privilege of subscribing thereto, means capital stock.

An act of the legislature authorized the issue of bonds by a county "in subscription for preferred stock" of a railroad company, and the act provided that the county "shall receive from the company preferred stock to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent per annum." *Held*, that this preferred stock meant capital stock, different from other capital stock only in the preference given to it in the matter of dividends.

A certificate of stock tendered by the company to the county setting forth that the county was entitled to the stated amount, but impliedly declaring it not to be capital stock, was not sufficient; and there was no error in a writ of mandamus prescribing a form of certificate in substantial compliance with the terms of the act.

The judges of the Courts of Common Pleas have power at chambers to issue writs of mandamus.

A demand by the county made upon the railroad company for certificates of preferred stock, although the demand did not specify the precise character of the certificates, was sufficiently definite to warrant this subsequent proceeding by mandamus.

The peremptory writ in mandamus must conform to the alternative writ, but such conformity existed in this case.

Before **MACKEY, J.**, Chester, July, 1881.

This was a proceeding by mandamus on the petition of the State of South Carolina, ex relatione W. Banks Thompson, John O. Darby and Waties Pendergrass, as county commissioners in and for the county of Chester, against the Cheraw and Chester Railroad Company, and William Hardin, as president, and David Hemphill as secretary and treasurer of said railroad company. The opinion states the case.

Messrs. J. & J. Hemphill and J. H. Rion, for appellants.

Messrs. A. G. Brice and S. P. Hamilton, contra.

March 4, 1882. The opinion of the court was delivered by

SIMPSON, C. J.—Under an act entitled “An act to authorize and empower certain counties to issue bonds in subscription for preferred stock of the Cheraw and Chester Railroad Company,” approved March 14, 1874, the county of Chester subscribed the sum of \$75,000, and in accordance with the terms of said act, duly made, executed and delivered seven hundred and fifty bonds, of the par value of \$100 each, in payment of said subscription. The fourth section of said act provides as follows: “On the completion of the said railroad in the county, the board of county commissioners shall receive from said company an amount of preferred stock of said company equal to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent per annum.

This road had been completed for more than a year prior to this proceeding, which was commenced on May 13, 1881, by petition to Hon. T. J. Mackey, Circuit Judge, at chambers, praying that a writ of mandamus do issue to Hardin, the president of the company, and Hemphill, the secretary, commanding them to execute and deliver certificates for fifteen hundred shares of preferred stock of said company to the petitioners, county commissioners, alleging a demand and refusal, previously made. Upon this petition an alternative writ was granted on May 13, 1881, requiring the respondents to make and execute a certificate or certificates of “preferred stock” in the Cheraw and Chester Railroad Company to the amount of \$75,000, . . . and to deliver the same to the said county commissioners immediately upon the receipt of the writ, or that they appear before the Honorable Thomas J. Mackey, Judge of the Sixth Circuit, sitting at chambers, in and for the county of Chester, at the Court House, on the 3d day of June, A.D. 1881, to show cause why they refuse to do so.

On the first day of June thereafter an order was granted the petitioners for leave to amend the alternative writ issued on May 13, by inserting the words, “In proper form and manner a certificate or certificates for fifteen hundred shares (of the par value of fifty dollars a share) of preferred stock in the Cheraw and Chester

Railroad Company, bearing interest at seven per cent per annum," in place of the words "certificate or certificates of preferred stock," etc., and also to insert after the word "subscription," in the original writ, the words "being fifteen hundred shares of said stock." This amended writ was served on June 3, 1881, with leave on the part of respondents to make their return thereto within twenty days; and the hearing was fixed for the 30th day of June. To these writs respondents made return within the time, and while denying that any demand had ever been made upon them for fifteen hundred shares, at the par value of \$50 a share, of preferred stock, and that no mandamus could lawfully issue from one of the judges of the Circuit Court, they tendered a certificate, which they stated the board of directors had authorized them to prepare, and further stating that they had no power to offer any other. The certificate tendered is as follows: "Cheraw and Chester Railroad Company. Certificate No. 1. \$75,000. State of South Carolina. Preferred stock, seven per cent interest. These presents certify that the Board of County Commissioners of the county of Chester, having issued seven hundred and fifty bonds of one hundred dollars each, of date April 1, 1875, in pursuance of an act of the General Assembly of the aforesaid State, entitled 'An act to authorize and empower certain counties to issue bonds in subscription for preferred stock of the Cheraw and Chester Railroad Company,' approved March 14, 1874, are holders of seventy-five thousand dollars of preferred stock of the Cheraw and Chester Railroad Company, which said stock bears interest at the rate of seven per centum per annum from the day of the completion of said railroad in said county, to wit; the 1st day of June, 1880, to be paid prior and in preference to any dividend upon the capital stock of the said company. Witness the hands of the president and treasurer, and the corporate seal. May 26th, A.D. 1881."

Judge Mackey held this certificate insufficient, as it failed to show the number of shares in the capital stock of the company which the county was entitled to, and leaving it doubtful whether it was intended as a certificate of indebtedness of the company to the county, or a certificate showing the number of shares that the county held in the capital stock of the company; and he issued a peremptory mandamus commanding the respondents without delay to deliver to the petitioners a certificate in the following form:

"This is to certify that the county of Chester is entitled to fifteen hundred shares in the capital stock of the Cheraw and Chester Railroad Company. This certificate of fifteen hundred shares of the capital stock of the Cheraw and Chester Railroad Company is preferred stock issued by virtue of the act of the General Assembly of the State of South Carolina, approved March

14th, 1874. Witness the hands of the president and treasurer, with the corporate seal."

From this peremptory mandamus the respondents to petition below have appealed on the following grounds:

1. Because the cause was heard and the judgment rendered at chambers.

2. Because there was no proof of any previous demand upon respondents for a certificate or certificates of fifteen hundred shares of the capital stock, or preferred stock, or preferred capital stock of said railroad company, but it was proved on the contrary that no such demand had ever been made.

3. Because the relators are not entitled to fifteen hundred shares of capital stock, or preferred stock, or preferred capital stock of the Cheraw and Chester Railroad Company.

4. Because the alternative writ of mandamus does not state sufficient facts upon which to base relators' claim to the relief demanded, nor does it set forth the particulars in which they have been wronged.

5. Because the peremptory writ of mandamus does not conform to the alternative.

6. Because the peremptory writ requires the respondents to execute and deliver a certificate in a particular form therein set forth, contrary to law.

7. Because respondents had already tendered to the relators, as county commissioners as aforesaid, a certificate for \$75,000 of preferred stock of said railroad company in conformity with law.

The prominent questions involved in this appeal are whether the respondents, under the facts and law, are entitled to a certificate from appellants representing that they have shares in the capital stock of appellants' company? And, if so, whether the certificate tendered by appellants, or the one ordered by the court, is the proper certificate? This question must be determined upon the construction which shall be given to the act of the legislature above referred to, under which the county of Chester has become connected with this railroad.

The words in that act to be interpreted, and upon which the question depends, are "preferred stock." What was meant by these words is the question. The act authorized the counties to subscribe for "preferred stock" and the county commissioners to receive certificates of "preferred stock" for such subscription. Did the legislature intend by this that the county should have shares in the capital stock of the company, or that it should become simply a preferred creditor, or occupy some other relation not well defined?

The first rule in ascertaining the intent of an instrument, whether it be an act or any other paper, is to go to the meaning of the words. What then is the meaning of the term "stock?" Stock

in its general acceptation, when applied to business, according to lexicographers, means money invested in business. Capital stock and capital are synonymous terms, hence capital stock. In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or government; and it makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise. If the money is borrowed it is represented in the hands of the lender by bonds, notes or other papers, with the government by governmental securities, sometimes called stocks. But in such cases the lender is not a stockholder in the business. So far as the party himself is concerned, if the money borrowed or otherwise obtained is invested in his business, it is capital or stock in trade. This is the general meaning of the term.

But when it is used in connection with a chartered or joint stock company, made up of individuals, it has a somewhat more limited signification. It means then the money advanced by the corporators or members as the capital, which is usually, for convenience, divided into equal amounts called shares, for which each member is entitled to a certificate showing the number of shares which he has in the company; or, in other words, the amount of money he has furnished to the common stock; which certificate is the evidence of his being a stockholder. Field Corp. § 123.

The word "stock" in connection with a corporation composed of numerous corporators united in one organism by charter, seems to have this technical meaning, in the limited form above given; and although a corporation as well as natural individuals engaged in business may borrow money, and indeed are often compelled to do so, yet the money thus borrowed is not understood to be stock, except in the general acceptation above given. The corporators are not entitled to distinct shares in such money, nor are the bonds or other evidences of indebtedness given by the company in such cases to the lender called the stock, capital or otherwise, of the company.

Our opinion is, that when the term "stock" is used with reference to railroad or other corporations, especially when it is used in connection with the privilege to "subscribe" thereto, it means capital stock. We have not been pointed to a case or an authority where, with such surroundings, it could be or has been legitimately interpreted otherwise. There is no other stock in a business company, the basis of which is money, except capital stock; if so, it has not yet received a name or distinctive feature.

Would a privilege to subscribe to stock in a company chartered and organized for business purposes, ever be interpreted by any one to mean a privilege to lend money to such company in the sense of becoming a creditor? Such a conception would scarcely enter the mind of the most experienced in the ways of such com-

panies if invited to subscribe to the stock. The common mind would never think of such an idea, and the rules of interpretation require that the ordinary and well understood meaning of words should be given to them, unless they are controlled and directed by the context, or by the demand of other words, or other parts of the instrument, when the whole is construed together. If Chester County is not a stockholder or shareholder, what relation does it occupy to the company? If it be that of a creditor, where is the evidence of the debt, and when is the debt to be paid? There is nothing promised except the interest, and that is contingent. If the county is a stockholder, what other stock has the company but capital stock?

Next, what does the word "preferred" mean? This word is relative; it refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which but for this advantage would be like to other. If, then, the term "stock" when employed in connection with railroad or other chartered companies, means money invested in the business of the company, represented by certificates of shares, known as capital, or capital stock, and there is no other known stock belonging to such companies, having a distinct and separate characteristic from capital stock, what effect can the word "preferred" have when attached to it, except to indicate that in that case it is to have some advantage which it would not have otherwise? In other words, in such case can it be anything else than preferred capital stock, or a preferred interest in the money paid in by stockholders, divided into shares and represented by certificates showing the shares of each holder? The word "preferred" used in the act intended certainly to give the counties some advantage over things holding a similar interest, and occupying (without that word) the same position to the company as the counties, and who, but for the county being preferred, would stand with them on the same plane.

Now, have the counties any preference over creditors? The only preference provided for, is the payment of seven per cent. It does not appear that other creditors are entitled to less; the county cannot therefor be a creditor. The act then must have intended to put the counties on the same plane with the other stockholders, with the advantage (over the others) of being preferred in the particular mentioned.

We think that when the legislature allowed the counties to "subscribe for preferred stock" in this company, it intended that they might subscribe to the capital stock thereof, their stock to be preferred over the common stock by being entitled to seven per cent interest out of the dividends in advance of the others.

Now, as to the certificate which should be issued to the county commissioners. Having held that the words "preferred stock" in the act, accompanied with the word "subscribe," indicated the capital stock, the same words employed in the certificate would mean the same thing there; and if the railroad authorities in the certificate tendered had followed the language of the act strictly, without additional expressions throwing doubt upon their understanding, or rather indicating that they did not intend the county to be regarded as shareholders in the capital stock of the company, then the certificate would have been a compliance with the act and in strict performance of the duty imposed upon them, and in such case they would have been exempt from this writ. But they added to the words of the act the following: "Prior and in preference to any dividend upon the capital stock of the company." This was drawing a distinction not only as to the preference, but as to the essential character of the stock. This was in effect denying that the county was a shareholder in the capital stock, and impliedly asserting that it held some other position. Now, it is not for this court to speculate as to what underlies this controversy, but whatever may be behind it, the parties in conflict, either present or prospective, have a right to place themselves in proper position—the position to which the law entitles them.

We think the legislature means that the counties subscribing should have a certificate showing that they were stockholders in the capital stock of the railroad company; that the certificate tendered by the company as at pretest couched fails to show this—in fact it implies otherwise. We think further that the certificate ordered by Judge Mackey expresses the idea plainly and fully as to this right, and, therefore, that his order should be affirmed.

The cases referred to by the counsel of appellant in which the terms "preferred stock" are concerned, have been examined and considered. We have found nothing in any of these cases antagonistic to the position taken above. It seems to be admitted in all the cases that the holders of preferred stock are shareholders or stockholders in the stock of the company. The question which seems to have been discussed in many of the cases was, whether the company had the power to create preferred stock. In others, what were the rights of the holders of such preferred stock as to the interest or dividend allowed on such stock. And in some of them, what control such stock had in the management of the company. In no case was it denied that they were stockholders, or claimed that they were simply creditors.

Most of the cases relied upon by appellant will be found reviewed somewhat in *Green Br. U. V. 164* and notes. See the cases there of *St. John v. The Erie R. R. Co.*, 22 Wall. 136; *Wil-*

liston v. Mich. Southern & Ind. R. R. Co., 13 Allen, 400; Hazlehurst v. Savannah, G. & N. A. R. R. Co., 43 Ga. 13; Rutland & Burlington R. R. Co. v. Thrall, 35 Vern. 536; Hoyt v. Quicksilver Mining Co., 17 Hun. 172; Kent v. Quicksilver Mining Co., 12 Hun. 53; Bailey v. R. R. Co., 17 Wall. 99; Taft v. R. R. Co., 8 R. L. 311. Some of these were the cases cited for appellant. They involved almost entirely questions of the character above stated. In the discussion of these questions the "preferred stock" is constantly referred to as represented by shares, and in no case are the holders of such preferred stock regarded as creditors simply. Such stock has often been resorted to, say these cases, to raise money, when the corporation has become crippled, and disaster and failure seemed near at hand; and with the view to raise the money, this stock has been allowed some advantage, some preference over the common stock.

"The issue of preferred stock," says Mr. Pierce, "is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt. Its holders are a privileged class who are entitled to dividends of a certain per cent, payable out of the net earnings, in priority to any dividends upon ordinary stock." Pierce Rail. L. 124.

We come next to the exceptions to the mode of procedure, etc., in this case. The first raises the question of the power of the judge to hear application for mandamus at chambers. This power is expressly conferred on the judges of the Court of Common Pleas by statute. Gen. Stat. 547.

The next raises the question of demand. It seems that demand was twice made on the officers of the company for the certificate. It is true the demand did not specify the precise character of the certificate which the commissioners claimed to have issued, but it was a demand for certificates of "preferred stock," and we think was sufficiently definite to warrant this proceeding, upon failure to respond on the part of the company.

The appellants further except: "Because the peremptory writ of mandamus does not conform to the terms of the alternative writ." The alternative writ in mandamus is required to sustain the same relation to such proceedings as a declaration does to the ordinary common law action. High Extr. Rem. §§ 449, 530. In it is found the relator's cause of action and the relief which he seeks. It combines the double function of process and pleading. It serves to bring the respondent into court as well as to apprise him definitely of the ground of action against him. The peremptory writ is the final process or judgment, and it must conform to the alternative; otherwise it is defective. In the amended alternative writ in this case, the relator claimed a certificate of fifteen hundred shares of preferred stock under the act March 14th, 1874. The peremptory writ substantially conforms to this claim, and the

certificate prescribed by the judge is, in substance, in accordance with the mandate of the writ.

It is the judgment of this court, that the order of the judge below be affirmed.

MOLVER and MCGOWAN, A. J.'s, concurred.

WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC R. R. CO. ET AL.

(86 *New Jersey Eq.* 233.)

After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued, . . . the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years, dividends of seven per cent or less were declared on the preferred stock alone, and in other years, such dividends were declared on both the preferred and common stock. *Held*, that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits, but when such profits had been earned, he was entitled to a dividend of seven per cent therefrom, before any dividend could be paid on the common stock.

The silence or failure of a former owner of such preferred stock to object to the declaring of any dividends on the common stock until after he had been paid seven per cent on his own, will not estop the present owner thereof from asserting his claim to re-imbursement to that extent out of the future profits.

On application for an injunction. Heard on bill and affidavits and answer and affidavits and order to show cause.

Mr. David J. Pancoast and Mr. Samuel H. Grey, for complainants,

Mr. Peter L. Voorhees and Mr. B. Williamson, for defendants.
VAN FLEET, V.C.

The defendants in this suit are the Camden and Atlantic Railroad Company and its thirteen directors. The object of the suit is to restrain the defendants from doing two things: First from paying a dividend on the ordinary stock of the company until the amount of dividend due on the preferred stock has been paid; and second, from issuing any additional stock, either ordinary or preferred.

The defendant corporation was chartered in 1852, with a capital of \$500,000, and liberty was given to increase its capital to \$1,500,000. The capital was divided into shares of \$50 each. The

road was opened for traffic in July, 1854. Shortly after the corporation commenced business it was found to be so much embarrassed financially as to require legislative aid. On the 7th of February, 1856, a supplement to the charter was approved, authorizing the corporation to issue the additional stock of \$1,000,000 which it had liberty to issue under its charter as preferred stock, the shares to be the same in amount as the ordinary stock. In defining the rights of the holders of the preferred stock, the supplement declares :

"That when so issued and declared to be preferred stock, the holders thereof respectively shall be entitled to receive dividends on the same not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company."

Of the twenty thousand shares of preferred stock so authorized to be issued, seventeen thousand six hundred and thirteen have been issued, aggregating a value at par of \$880,650, and leaving unissued two thousand three hundred and eighty-seven shares. Of those issued, the complainant holds seven thousand eight hundred shares, worth, at par, \$390,000. Of the ten thousand shares of ordinary stock which the defendants were authorized to issue, seven thousand five hundred and forty-eight have been issued, representing a capital, at par, of \$377,400, and leaving unissued two thousand four hundred and fifty-two shares. Of the ordinary stock, the complainant holds two thousand six hundred and forty-six shares, worth, at par, \$132,300. Of the total capital of the corporation of \$1,258,050, the complainant holds \$522,300. The answer says that he has acquired all his stock since the 10th day of February, 1882.

No dividends were declared on either class of stock until 1872. In that year a dividend was declared on the preferred stock, but none on the ordinary stock, and the same thing was done again in 1873. In 1874 a dividend of seven per cent was declared on the preferred stock, and three and one-half per cent on the ordinary stock. But from that date on until November 1st, 1879, dividends of exactly the same per centum, or at the same rate, were declared at the same time on both classes of stock. On the date last named, another dividend was declared on the preferred stock, but none on the ordinary stock; and in April 1880, a dividend of the same amount, payable in preferred stock, was declared on both classes of stock. No dividend since then, until the one in question, has been declared. On the 21st of September, 1882, the directors declared a dividend of four per cent on the preferred stock, and three per cent on the ordinary stock. The complainant insists that this action of the directors, so far as it seeks to appropriate a part of the profits to the payment of a dividend on the ordinary stock before he has received seven per cent on his preferred stock, not only for the last current year, but for each year since the issue of his stock,

is a violation of his rights, which should be enjoined. This constitutes his first title to relief.

There are certain legal principles pertinent to this discussion which I think are so firmly established that they may be taken for granted, without argument or the citation of authorities: First, stockholders are not creditors, and until the winding up of the corporation, are entitled to nothing from it but a distribution of its net earnings; second, dividends can only be paid out of profits; third, calling stock preferred stock does not, per se, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued; and, fourth where the statute or contract under which preferred stock is issued, declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate per annum, without limiting the annual sum to be paid as dividend to profits earned or made within a designated period—as, for example, that he shall receive a dividend of seven per cent per annum before any dividend shall be paid on the ordinary stock—there the preferred stockholder is entitled to seven per cent per annum from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at seven per cent per annum from the date of the issue of the stock held by him. The principle last stated rests mainly on English adjudications, and has in that country received the approval of such judges as Lord Cranworth, Lord Hatherly, Lord Justice Knight Bruce and Lord Justice Turner. The cases in which it has been enunciated are *Henry v. Great Northern Railway Co.*, 3 Jur. (N. S.) 1117; S. C. on appeal, 1 De G. & J. 606; *Crawford v. North Eastern Railway Co.*, 3 Jur. (N. S.) 1093; *Sturge v. Eastern Union Railway Co.*, 7 De G. M. & G. 158; *Matthews v. Great Northern Railway Co.*, 5 Jur. (N. S.) 284. The doctrine of all these cases, on the point under consideration, was approved in *Boardman v. Lake Shore and Michigan Southern Railroad Co.*, 84 N. Y. 157.

Two of the English judges liken the case to a partnership agreement, where two of three copartners agree that the third shall, out of the profits of their ventures, have a certain fixed per centum per annum on his capital, before any part of the profits are payable to them. And they both hold that in such case, there being no agreement that what is payable to the third should be paid out of the profits made during the current year, or any other designated period, it would be clear that he would have a right, at all times, to say to the other two, "I have not received the five per cent, or

ten per cent per annum on my capital which, by the terms of our agreement, I am entitled to, and, until I get it, not a farthing of the profits can go to you."

The construction given by the English courts to such statutes and contracts rests, principally, on the fact that they plainly provide for the payment of a dividend at a fixed rate each year, and do not attempt to limit or restrict the dividend which the preferred stock shall be entitled to, to the profits of the year in which the right to the dividend accrues. The great distinction between the two classes of stock seems to be this: ordinary stock is not entitled to a dividend until sufficient profits to warrant a division of profits have been earned, but preferred stock, issued under a statute containing a provision that a dividend of fixed amount shall be paid each year, is entitled to a dividend each year at the stipulated rate, even if no profits are made, but the holder of such stock cannot compel the payment of his dividend until the corporation has a fund on hand which can properly be regarded as profit.

Now, it will be observed, that the statute under which the preferred stock held by the complainant was issued, makes no provision for the payment of an annual dividend at a fixed and certain rate; indeed, I think it may well be doubted whether it makes provision for the payment of an annual dividend at all, except profits exist sufficient to warrant the payment of a dividend. Dividends, as already remarked, can only be paid out of the profits. The statute under consideration says that the preferred stock shall be entitled to receive a dividend, not exceeding seven per cent per annum, before any dividends shall be paid on the ordinary stock. But suppose no profits are made for three or five years after the issue of the stock, is the preferred stockholder entitled to dividends during that period? if so, at what rate? and who is to fix the rate? and on what principle is the rate to be fixed? In ordinary cases the directors of a corporation are charged with the duty of declaring dividends, and in the performance of that duty they must have regard to the amount of the profits, and also to the sum necessary to be reserved out of the profits to meet contingencies, and to be expended in repairs and improvements. In case there are no profits, it is clear they have no power to declare a dividend. It is equally clear that no rate is fixed by this statute. It would seem, therefore, to be certain, as a matter of logic, that no right to a dividend can accrue to the preferred stock until the pecuniary condition of the corporation is such as to render the declaration of a dividend a duty. The maximum of the preferred dividend is specified. It may be seven per cent it cannot be more; it may be less, or it may be nothing. No minimum is specified. This being the case, is it not obvious that the legislature meant, and the persons who originally took the stock must be assumed to have understood that the amount, within the limit prescribed, payable

annually in dividends on the preferred stock, would depend wholly upon the amount of profits which, in the proper and judicious management of the affairs of the corporation, could be divided among its stockholders? There is not the slightest warrant for saying that the legislature meant that the preferred stockholder should have seven per cent per annum on his stock, whether the net earnings which could properly be applied in the payment of dividends were sufficient to give him a dividend at that rate or not; or that if the net earnings of any year were not sufficient to give him a seven per cent dividend, he should have a right to carry any deficiency which might exist over to the next year. On the contrary, the language employed renders it very clear, I think, that what the legislature meant was this: The rights of the preferred stockholder should depend upon the pecuniary condition of the corporation; if there were no profits during the current year, he was not entitled to a dividend; if there were, he was entitled to a preference to the extent of seven per cent; if the profits were not sufficient to give him seven per cent, he was entitled to a dividend at such rate as they were sufficient to pay, but not to carry any deficiency or arrears over to a subsequent division of profits. In other words, his rights were to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year.

The conclusive argument against the complainant's claim, that he is entitled to yearly dividends of definite amount, whether profits were made or not, is, that the statute under which he asserts his claim neither promises nor secures to him a dividend of any amount or at any rate, but simply declares that his dividend shall not exceed a certain sum.

Adopting the construction just stated as the rule by which the complainant's rights are to be measured, it is manifest that he is entitled to have that part of the action of the defendants enjoined which attempts to appropriate part of the net earnings to the payment of a dividend on the ordinary stock before a dividend of seven per cent has been paid on the preferred stock. If they have profits sufficient to divide seven per cent on the preferred stock, or any sum less than seven, they are bound, I think, to give it to the preferred stock, and have no right to appropriate anything to the ordinary stock until they have divided seven per cent to the preferred stock.

I am not required, nor would it be proper, on an intermediate proceeding like that now before the court, to express an opinion respecting the complainant's right to be re-imbursed out of future earnings for such part of the profits as have been improperly appropriated as against the preferred stockholders, to the payment of dividends on the ordinary stock, further than to say that I do not think that the preferred stock can, by any just use of equitable

rules, be held to be precluded or estopped from asserting its right of preference given by the statute simply because the persons who held it at the times those dividends were declared, allowed them to be declared and paid without objection or question. It requires something more than simple silence and non-action, in such a case, to raise an estoppel against the assertion of a right secured by a statute. *Matthews v. Great Northern Ry. Co.*, 5 Jur. (N. S.) 284.

The other ground upon which the complainant asks the protection of the court needs no discussion. He says he has been informed and believes that the defendants intend to issue a part or the whole of the unissued stock, both preferred and ordinary, for the purpose of maintaining themselves in office, and preventing him and those who think as he does from exercising such control over the affairs of the corporation as they are entitled to exercise. To this the defendants answer that while it is true that some months ago the president was authorized by resolution of the board to sell stock of the company at par, they have no such purpose now; that there is no necessity now for any purpose whatever to issue additional stock, and that they have no intention or design to make any further issue. If what they say is true, and the court is bound so to regard it, the complainant is in no danger and needs no protection.

The complainant is entitled to an injunction restraining the payment of the dividend declared on the ordinary stock on the 21st day of September, 1882, until a dividend of seven per cent. has been paid on his preferred stock.

We propose in this note to review briefly the American decisions relative to the subject of preferred stock in a railroad company. There are numerous English decisions upon this point; but, as they depend largely upon the construction of statutes, we have deemed it best not to burden these pages with them. References to all of the most important of them will be found in the cases cited below.

PREFERRED STOCK—DEFINITION.—Preferred stock may be defined as stock issued upon such terms that the holder thereof is entitled to certain dividends out of the profits earned by the corporation in priority to any dividends distributed to the holders of common stock. The rights of preferred stockholders in every case are determined by the peculiar terms of the resolution authorizing the issue of the stock, and the peculiar provisions of the certificates in question.

POWER TO ISSUE PREFERRED STOCK.—A corporation may, it seems, without any special charter authority, place shares of preferred stock in the market upon stating its corporate existence, and thus divide its stockholders into classes. No principle of law would seem to militate against this conclusion. In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, the court said:

"We are not prepared to say that, at the first, the corporation might not have lawfully divided the interest in its capital stock into shares, arranged in classes, preferring one class to another in the right it should have to the profits in the business. The charter gave power to make such by-laws as it might deem proper consistent with constitution and law, and to issue certificates of stock representing the value of the property. We know nothing in the Constitution or the law that inhibits a corporation from

beginning its corporate action by classifying the shares in its capital stock with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there could be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired."

Even after the corporation has come into being this same power may be exercised, provided the whole amount of the capital stock is not taken up. *Hazlehurst v. Savannah, etc., R. R. Co.*, 48 Ga. 18.

Where, however, the whole capital stock has been taken up, it seems that it is not competent for the corporation, without the consent of all the stockholders to authorize the transmutation of common into preferred stock on payment of a bonus. Such a proceeding is a violation of the vested rights of the dissenting stockholders. Upon this point the opinion in *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, is clear:

"It is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes—one of which is merely given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterwards with the others in what earnings may remain—destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock. . . . It is contended that the power so to do is an incidental and implied power, necessary to the use of the other powers of the corporation, and is a legitimate means for raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money, and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such a way as to put the burthen upon every share of stock alike, to enable every share of stock to be relieved therefrom alike, in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder."

All the other cases bearing upon this point are here reviewed at full length, but the reader will find it extremely difficult to reach a conclusion. In many cases express power has been given to issue the preferred stock; in others it has been issued by consent; in others the power to issue it has not been directly involved.

The acceptance of an amendment to the charter of a company authorizing the issue of preferred shares with guaranteed dividends does not release a subscriber to the stock from his liability therefor. *Rutland & Burlington R. Co. v. Thrale*, 85 Vt. 536. Where a common stockholder has delayed for a long time to raise objections to the issue of preferred stock, he will be estopped by his laches from asserting that the issue is *ultra vires*. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Hoyt v. Quicksilver Mining Co.*, 17 Hun. 169.

He will also be estopped where he stands by and without protest sees a contract to issue such stock executed. *Hazlehurst v. Savannah, etc., R. R. Co.*, 48 Ga. 18.

DIVIDENDS ON PREFERRED STOCK PAYABLE ONLY OUT OF EARNINGS.—It is usually specially provided in the certificates of preferred stock that dividends shall only be paid from the net earnings of the company. Even if such a provision is not specially inserted, it will be implied. An agreement to pay preferred dividends, without regard to the ability of the company to earn them would be most clearly contrary to public policy. *Lockhart v. Van Alstyne*, 31 Mich. 76.

"A contract the necessary construction of which would lead or tend to the consequences pointed out—which would require dividends, when honesty and good faith to the public would forbid, and public opinion condemn them, which would antagonize the positions of different classes of men engaged in the same joint undertaking, and preclude harmony of action and unity of effort, precisely under those circumstances where harmony and union would be most essential, under which the corporation making it must almost inevitably be destroyed unless it should enjoy continuous prosperity; and which under some circumstances would make one class of persons having a voice in the control and management of the corporation interested in so controlling its means as to keep them as long as possible in an unproductive condition, until by a slow process they can absorb them to the prejudice of their associates—must necessarily be opposed to public policy and void."

Such a construction will always, therefore, be put upon the certificates as to make the dividends payable from earnings only; even where they are specifically guaranteed. *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Hartford*, etc., R. Co., 8 R. I. 310.

"It is perfectly apparent that the guaranty of a dividend by a railway company is considered . . . to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed; and as the statement of facts admits that dividends have not been earned in this case, the plaintiff, if there were no other difficulties in his way, could not recover." *Taft v. Hartford*, etc., R. Co., 8 R. I. 310.

For a proper construction of the term "net earnings," see *Union Pacific Railroad Co. v. United States*, 99 U. S. 402. Net earnings properly applicable to dividends on preferred stock cannot be applied to permanent improvements upon the road. *Thompson v. Erie R. Co.*, 45 N. Y. 468.

The preferred stockholder is entitled to his dividend out of net income whenever accruing; and if there is a deficit in one year which prevents a dividend, he is entitled to a dividend for such year out of the profits accruing years before any dividend can be made on the common stock. *Prouty v. Mich. S. & N. I. R. Co.*, 52 N. Y. 368; *Lockhart v. Van Alstyne*, 31 Mich. 76. But some agreements confine the right to such dividends out of the earnings of the current year. *St. John v. Erie R. Co.*, 22 Wall. 136.

CONSTRUCTION OF AGREEMENT.—Parol evidence is inadmissible to show the understanding of the parties as to a written agreement for the issue of preferred stock. *Bailey v. Railroad Co.*, 17 Wall. 96. But the resolution of the board of directors authorizing the issue of such stock, and the book containing the minute of such resolution are admissible to explain the terms of the certificates. *Boardman et al. v. Lake Superior & M. S. R. Co.*, 84 N. Y. 157. See also *Stevens v. South Devon R. R. Co.*, 9 Hare, 313; *Sturge v. E. U. R. R. Co.*, 7 De G. M. & G. 158; *Crawford v. N. E. R. R. Co.*, 8 Jur. (N. S.) 1093; *Matthews v. G. N. E. R. R. Co.*, 5 Jur. (N. S.) 284; *Corey v. Londonderry & E. R. R. Co.*, 29 Bear. 263; *Harrison v. Mexican R. L. Co.*, L. R. 19 Eq. Cas. 358.

In *Bailey v. Railroad Co.*, 17 Wall. 96, the certificates issued to the preferred stockholders provided that they should be entitled "to receive all the net earnings of said company which may be divided in each year up to \$7 per share, and to share in any surplus beyond \$7 per share which may be divided upon the common stock." It was held under this provision that after the preferred stockholders received seven per cent, the common stockholders were entitled to an equal sum per cent before the stockholders got more where the agreement to issue the preferred stock contained the following clause: "Such preferred stock shall be entitled to preferred dividends out of the net earnings of said road, not to exceed seven per cent in any one year, payable semi-annually, after payment of mortgage, interest and delayed

coupons in full," and subsequently money was borrowed to repair the road, and other roads were leased. It was held that interest on the amount borrowed, and the rent of the leased roads should be paid in priority to dividends of preferred stockholders. *St. John v. Erie R. Co.*, 22 Wall. 186. See *Bates v. Androscoggin & Kennebec R. Co.*, 49 Me. 491.

PRIORITY OF MORTGAGES OVER PREFERRED STOCK.—The holder of preferred stock has no priority of lien to mortgages on the property of the company, unless some specific agreement to that effect be shown. *King v. Ohio & Miss. R. R. Co.*, 9 Rep. 481.

The vendors of a railroad who receive preferred stock in the purchasing company as the price thereof are not entitled to be paid out of proceeds of said road at a foreclosure sale in preference to mortgages created thereon subsequent to the purchase. *Branch v. Atlantic & Gulf R. Co.*, 3 Woods 481.

HOW FAR HOLDERS OF PREFERRED STOCK ARE CREDITORS.—The issue of preferred stock is generally resorted to when a company is in an embarrassed position and is in urgent need of cash, or at any rate requires to get rid of some of the bonded indebtedness pressing upon it. The preferred stock is in the latter case exchanged for the bonds. *Bailey v. Railroad Co.*, 17 Wall. 96; *Westchester & Phila. R. R. Co. v. Jackson*, 77 Pa. St. 321.

Viewed in this light the stock is regarded as a mere substitute for a bond and mortgage. *Rutland & Burlington R. Co. v. Thrall*, 35 Vt. 536; *Bates v. Androscoggin & Kennebec R. Co.*, 49 Me. 491; *Westchester & Phila. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Hazlehurst v. Savannah, etc., R. Co.*, 48 Ga. 18; *St. John v. Erie R. Co.*, 22 Wall. 126.

Hence, in this light, the holder of preferred stock, may be viewed as a creditor of the company. For many purposes, however, he is not a creditor. He is personally liable, like other stockholders, for the debts of the corporation. *Burt v. Rattle*, 31 Ohio St. 116.

He has a right to vote like other stockholders at the corporate meetings. *St. John v. Erie R. Co.*, 22 Wall. 136; but see *Burt v. Rattle*, 31 Ohio St. 116; *Rutland & B. R. Co. v. Thrale*, 35 Vt. 536.

The option is often given to convert the preferred stock at the end of a certain time into common stock. Of course, where this is done the holder has no pretensions to the character of a creditor. *Burt v. Rattle*, 31 Ohio St. 116. But where the option is not exercised and the company being unable to pay the amount of the preferred stock, gives in lieu thereof mortgage bonds, calling in and cancelling the preferred scrip, the holders of such bonds are in case of subsequent insolvency entitled to claim as creditors. *Totten & Co. v. Tison*, 54 Ga. 139.

REMEDIES OF HOLDER OF PREFERRED STOCK.—The holder of preferred stock may have resort to legal process to enforce the payment of his guaranteed dividends. *Boardman et al. v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157; *Westchester & Phila. R. Co. v. Gray*, 77 Pa. St. 321.

The proper remedy is at law. *Bates v. Androscoggin & Kennebec R. Co.*, 49 Me. 491; *Westchester & P. R. Co. v. Jackson*, 77 Pa. St. 321. But see *Willeston v. Mich. S. & N. I. R. Co.*, 13 Allen, 400, where it is said that the remedy is in equity alone.

Where two railroad companies are consolidated, one of which has issued preferred stock, the consolidated company is liable for all the dividends guaranteed on such stock. *Chase v. Vanderbilt*, 62 N. Y. 307; *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363.

In a suit to enforce such dividends the officers of the consolidated company need not be joined as parties defendant. *Chase v. Vanderbilt*, 62 N. Y. 307.

AGREEMENT TO PAY INTEREST ON STOCK.—Akin to the subject we have been considering, is that of agreements to pay interest on stock. It is clear,

in accordance with principles above laid down, that such agreements are invalid unless the interest is to be paid from the earnings of the road. *Painesville & H. R. Co. v. King*, 17 Ohio St. 584; *Troy & B. R. Co. v. Tibbetta*, 18 Barb. 297; *Miller v. Pittsburg & C. R. R. Co.*, 40 Pa. St. 237; *Pittsburg & C. R. Co. v. Allegheny Co.*, 63 Pa. St. 126. But see *Milwaukee & N. I. R. Co. v. Field*, 12 Wisc. 340; *Racine Co. Bank v. Ayers*, 12 Wisc. 512; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Laughlin v. Detroit & M. R. Co.*, 8 Mich. 100.

It is permissible, however, to agree that interest shall be paid on subscriptions to stock until the whole amount is collected. This equalizes the rights of the various stockholders paying at different times. *Rutland & B. R. Co. v. Thrale*, 35 Vt. 586; *Wright v. Vermont & M. R. Co.*, 12 Cush. 68.

Sometimes it is agreed that interest shall be paid on the stock until the road is completed. *Ohio City v. Cleveland & T. R. Co.*, 6 Ohio St. 489; *McManus v. Phila. & R. R. Co.*, 58 Pa. St. 330; *Pittsburg & C. R. Co. v. Allegheny Co.*, 63 Pa. St. 126; *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100; *Richardson v. R. R. Co.*, 44 Vt. 613.

But such an agreement will be construed only to authorize the payment of interest from earnings. *Waterman v. Troy & G. R. Co.*, 8 Gray, 433; *Cunningham v. Vermont & M. R. Co.*, 12 Gray, 411; *Painesville & H. R. Co. v. King*, 17 Ohio St. 584; *Richardson v. Railroad Co.*, 44 Vt. 613.

HENRY I. JACKSON, as Executor, etc., Respondent,

v.

THE TWENTY-THIRD STREET RAILWAY COMPANY, Appellant.

(88 *New York Reports*, 520.)

It is essential to constitute a valid gift, that there should be a delivery such as vests in the donee control or dominion over the property, and absolutely divests the donor, and the delivery must be made with intent to vest the title in the donee.

One S. purchased and paid for thirty shares of defendant's stock, directing the treasurer at the time to set it aside in the name of Y., plaintiff's testator, and that he (S.) would let him know whether to deliver it to Y. and what to do with it at some future time. The treasurer issued a receipt stating that he had received the purchase-price from Y., which receipt came into the possession of the latter, in what way it did not appear; Y. had married a niece of S., lived in his family, and had adopted a child in whom S. took a special interest. Afterward S. told Y. that he could make the shares but twenty-seven, and as the receipt had been made out to him he would want an order for the three shares. Y. thereupon gave an order directing the company to transfer three shares of the stock then held by him, as S. might direct. No certificate of the stock was ever issued. When a dividend had been declared thereon, S. directed Y. to go to the office for it, that he had had the dividends made out in his name, and they would support or help support the child, and the dividends were paid to Y. by the direction of S. until the death of Y. After the stock had been thus placed in the name of Y., his wife died; he married again, and his second wife ceased to care for the child. In an action to compel defendant to issue to plaintiff a certificate of the stock, *held* (ANDREWS, Ch. J., and FINCH, J., dissenting), that there was no

valid gift of the stock, as it was clearly not the intent of S. to vest the title in Y. for himself but to create a trust for the benefit of the child, nor was it his intent that Y. should control the stock.

Also *held*, that this defense was available to defendant.

Jackson v. Twenty-third St. R. Co. (15 J. & S. 85) reversed.

(Argued March 2, 1882; decided April 11, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 5, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 15 J. & S. 85.)

The nature of the action and the material facts are stated in the opinion.

Osborn E. Bright, for appellant. There can be no gift of personal property without a delivery. The donee must acquire not only the possession, but the dominion of the property. (2 Kent's Com. 439; *Brink v. Gould*, 7 Lans. 423; *Irish v. Nutting*, 47 Barb. 370; *Noble v. Smith*, 2 Johns. 52; *Bedell v. Carll*, 3 N. Y. 581, at page 584 and 585; *Montgomery v. Miller*, 3 Redf. Surr. 154; *Curry v. Powers*, 70 N. Y. 212; *Harris v. Clark*, 3 Comst. 113-114.) Mr. Youmans acquired no title to the stock, as there was neither any written assignment nor any actual or symbolical delivery of it to him. (*Davis v. Bank of England*, 2 Bing. 393; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211, 216, 217; *Mechanics' Bank v. New York and New Haven R. R. Co.*, 3 Kern. 599; *Johnson v. Spies*, 5 Hun, 468; *Stevens v. Stevens*, 2 Redf. Surr. 265; *Doty v. Wilson*, 5 Lans. 7; *Davis v. Bank of England*, 2 Bing. 393; *Way on Voluntary and Fraudulent Alienations*, part 5, chap. 2; 2 Kent's Com. 439; *Gray v. Barton*, 55 N. Y. 73; *Stevens v. Stevens*, 2 Redf. Surr. 265.) It cannot be said that the receipt of July 11, 1872, constituted a delivery of the shares. Its whole force as a receipt is overcome by the uncontradicted proof, and by the express finding of the court, that Youmans in fact paid nothing. (*House v. Low*, 2 Johns. 378; *Wadsworth v. Alcott*, 6 N. Y. 64; *Sperry v. Miller*, 16 id. 407; *Southwick v. Hayden*, 7 Cow. 334; *Bushwell v. Pioneer*, 37 N. Y. 312; *Gaskell v. Gaskell*, 2 Y. & J. 502.) The evidence of the instructions from Mr. Sharp to Mr. May was competent, and was erroneously excluded and was properly reviewed, and being uncontradicted was conclusive in favor of defendant. (*How v. Brundage*, 1 Sup. Ct. 429.) As the instructions to Mr. May by Mr. Sharp should have been regarded by the trial judge, the mere fact that this stock was ordered to be placed in the name of Mr. Youmans is entirely immaterial; it was perfectly competent for Mr. Sharp to constitute Mr. May, the treasurer, his agent for the time being, and having at the time expressly reserved to himself the power to control the disposition of the stock in the future, he could revoke the authority and in-

structions given to Mr. May, and resume full control over his own property. (*Gaskell v. Gaskell*, 2 Y. & J. 502; *Bulbeck v. Silvester*, 45 L. J. Ch. Div. 280; *Taylor v. Fire Department*, 1 Edm. Ch. 293; *Geary v. Page*, 9 Bosw. 290; *Meiggs v. Meiggs*, 15 Hun, 453; *Bulbeck v. Silvester*, 45 L. J. Ch. Div. 280; *Taylor v. Fire Department*, 1 Edm. Ch. 293; *Doty v. Wilson*, 47 N. Y. 580; *Fisher v. Hall*, 41 id. 416; *Bryant v. Bryant*, 42 id. 11; *Garnsey v. Munday*, 24 N. J. Eq. 243.) Whether it was competent or not to show that the real nature of the transaction was an attempt to create a trust in favor of the adopted child, as Mr. Sharp did not do all that he could to divest himself of the legal title to the stock, since he failed to cause the certificate of the stock to be delivered to the proposed trustee, what he did was only in the nature of an incomplete gift and a court of equity will never help a mere volunteer to complete an imperfect gift. (*Perry on Trusts* [2d ed.], vol. 1, § 100; *Lewin on Trusts* [7th ed.], chap. 6, § 3; *Bridge v. Bridge*, 16 Beav. 315; *Moore v. Moore*, L. R., 18 Eq. 474; *Autrobus v. Smith*, 12 Ves. 39; *Martin v. Funk*, 75 N. Y. 134, 137, 138; *Perry on Trusts* [2d ed.], § 100; *Lewin on Trusts* [7th ed.], chap. 6, § 3; *Bridge v. Bridge*, 16 Beav. 316; *Moore v. Moore*, L. R., 18 Eq. 474; *Autrobus v. Smith*, 12 Ves. 39; *Martin v. Funk*, 75 N. Y. 134, 137, 138; *Milroy v. Lord*, 4 DeGex, F. & J. 264.) If the transaction should be held to be a valid gift to Youmans, then his proper remedy is at law for a conversion of the certificate, or by an action on the case, or by assumpsit, or an implied promise in law by the company to issue a certificate to him. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 597, 624; *Arnold v. The Suffolk Bk.*, 27 Barb. 424; *Davis v. Bank of England*, 2 Bing. 395; *Foll's Appeal*, 36 Legal Int. 495; *Ross v. Northern Pacific R. R. Co.*, 1 Woolworth's C. C. 26; *Lewis' Law of Stocks, Bonds and other Securities*, page 157; *Foll's Appeals* [1879], 36 Legal Int. [Pa.] 495; *Ross v. Union Pacific R. R.*, 1 Woolworth's C. C. 26.

Henry Stanton, for respondent. In an action brought against a corporation, by a person who appears as a shareholder upon the company's books, to compel the issue and delivery of a certificate for such shares, the defense that a third person, who has not been made party to the action and who has made no demand upon the company for the stock, is not available to the corporation. (*Bliven v. Hudson R. R. Co.*, 36 N. Y. 403; *Bates v. Stanton*, 1 Duer. 79; *Beach v. Berdell*, 2 id. 327; *Aubrey v. Fiske*, 36 N. Y. 47; *Rogers v. Wier*, 34 id. 463; *Campbell v. Erie R. Co.*, 46 Barb. 540.) This action is not brought to compel the delivery of shares of stock, but to compel the defendant to issue and deliver a certificate of stock to one who was already a share owner but to whom a certificate had not yet been given, and such an action will lie. (*Burrall v. Bushwick R. R. Co.*, 75 N. Y. 217, 218; and see also *John-*

son v. The Albany R. R. Co., 5 Lans. 222; The Chester Glass Co. v. Dewy, 16 Mass. 94, 101.) The prayer of the complaint being also "that the defendant account for all dividends," etc., and the court having adjudged that the plaintiff was the owner of the shares and entitled to the certificate, it was entirely competent for the court, sitting in equity, to give judgment for the dividend which became due on the stock between the commencement of the action and the day of trial. (Taylor v. Taylor, 43 N. Y. 578, 584; Tyler v. Willis, 35 Barb. 213; Boyd v. Foot, 5 Bosw. 110.) The transaction between the deceased and Mr. Sharp, in its most favorable view to defendant, was in substance a gift to the deceased. (Bouvier's Institutes, § 712.) The company is estopped from denying the fact that Youmans was a shareholder. (Frost v. Insurance Co., 5 Denio, 154; Wharton on Evidence, § 1081; Plumb v. Insurance Co., 18 N. Y. 392; Brown v. Bowen, 30 id. 519.) The retention of the certificate of shares by the company constituted a bailment. A chose in action may be the subject of a deposit. (Story on Bailment, §§ 51, 100, 111; Edwards on Bailment, §§ 11, 54; Marvin v. Elwood, 11 Paige, 365; Story's Eq. Juris., § 817.)

EARL, J.—The plaintiff, as executor of the will of Sidney A. Youmans, deceased, brought this action to compel the defendant to issue to him thirty shares of its capital stock, which the complaint alleged his testator Youmans, in his life-time, had purchased of the defendant. The defendant denied that Youmans had purchased the stock, and alleged that the stock was the property of Jacob Sharp. It was undisputed upon the trial that Sharp paid for the stock, but the claim of the plaintiff was that Sharp had given the stock to Youmans, and the sole controversy of law and fact upon the trial was whether a legal and valid gift of the stock had been made as claimed. The undisputed facts show that Youmans married a niece of Sharp, and he and his wife, such niece, lived in the family of Sharp and adopted a child in whom Sharp took a special interest. Youmans never paid a cent for the stock to Sharp or the company. At the time Sharp paid for it, on 11th day of July, 1872, the treasurer of the company issued a receipt as follows: "Received from Mr. Sidney Youmans \$2250, being in full for thirty shares of the capital stock of the Twenty-third Street Railway Company." This receipt found its way into the possession of Youmans. It does not appear how it got there; there is no evidence and I think no inference that it was delivered to him by Sharp. It was probably sent to him in some way in the ordinary routine of business by the treasurer of the company. The stock was entered upon the stock books, as we may infer, in the name of Youmans. At the time this was done he was not present, and Sharp told the treasurer to set aside thirty shares in the name of Youmans and that he would let him know whether to deliver it

to him and what to do with it at some future time; and Sharp subsequently said to Youmans that he had set aside thirty shares of the stock which he intended for the adopted child. After the thirty shares had thus been set apart, Sharp told Youmans that he could make the number of shares but twenty-seven, and that as the receipt had been made out to him for the shares, he would want an order from him for the three shares, and he then obtained from him, on the 19th of May, 1873, the following order addressed to the president and treasurer of the railway company: "Gentlemen, please transfer three shares of the stock now held by me in the Twenty-third Street Railway as Mr. Jacob Sharp may direct. Respectfully, Sidney A. Youmans."

The certificate of stock was never delivered to Youmans, but remained in the office of the company, as directed by Sharp. After the stock had been put in the name of Youmans, and a dividend had been declared, Sharp told him that he must go to the office for the dividends; that he had the dividends made out in his name, and they would support the child, or help support it, and in this way the dividends were paid to Youmans until the time of his death, by Sharp's direction. The wife of Youmans, Sharp's niece, died after this stock had thus been placed in his name, and he married a second wife, and that wife has ceased to take care of the child.

These are all the material facts appearing in the case; they are undisputed, and from them it must be determined, whether a valid gift of this stock was made to Yeomans; and I think it very clear that there was not. Delivery is essential to constitute a valid gift. The delivery must be such as to vest the donee with the control and dominion over the property, and to absolutely divest the donor of his dominion and control, and the delivery must be made with the intent to vest the title of the property in the donee. The intent is a necessary element of the transaction. Delivery, without intent to vest the title in the donee, could pass no title to him. Here it may be admitted that the payment of the money by Sharp, the entry of the stock on the books of the company in the name of Youmans, and the delivery to him of the receipt of July 11, 1872, would have been sufficient to constitute a delivery of the stock to Youmans, and sufficient to make a valid gift thereof to him, if such had been the intention of Sharp; but it is clear that such was not the intention. He did not, in any event, intend to vest the title in Youmans for himself; his intention was to create a trust for the benefit of the child, in whom he took the special interest. He did not intend that Youmans should control the shares of stock; he directed that they should be retained by the treasurer of the company, subject to his future control and direction. Youmans drew the dividends by his special direction and consent, for the support of the child. It may be true, in a legal sense, that it

was not necessary for Youmans to have the certificate of stock in order to constitute him a stockholder, but among business men the certificate of stock is regarded as representing the stock and the title thereto. Such is the common understanding, and Sharpe undoubtedly supposed when he retained the certificate that the stock remained subject to his control. The fact that Youmans did not, during his life, nearly seven years, call for the certificate of stock shows quite clearly that he did not regard himself as the owner of the stock; and that Sharp claimed to have the control and disposition thereof appears from the fact that he assumed to dispose of three shares thereof, after the certificate for the thirty shares had been executed. It is true that he applied to Youmans for an order to transfer these three shares, but that was merely a matter of form, because Youmans held the receipt and the shares appeared upon books of the company in his name. That was a mere matter of book-keeping. Therefore, I conclude that there was no delivery of the stock, within the meaning of the law, to Youmans, with the intent to vest the title in him and give him the control thereof, and hence there is no reason, in law or justice, why the plaintiff in this action should recover, and thus probably defeat the benevolent purpose which actuated Sharp when he caused this stock to be set apart.

This defense is available to the defendant. It cannot be compelled to deliver the certificate to the plaintiff, unless Youmans owned it or was entitled to it. It did not hold the certificate as bailee for Youmans, but as bailee for Sharp.

The judgment should be reversed and a new trial granted, costs to abide event.

MILLER, DANFORTH and TRACY, JJ., concur.

FINCH, J., reads for affirmance; ANDREWS, Ch. J., concurs.

Judgment reversed.

BRAY'S ADMINISTRATOR .

v.

SELIGMAN'S ADMINISTRATOR.

(75 *Missouri Reports*, 31.)

A party who has tried his case upon a theory involving the tacit concession of a particular fact, will not be permitted in the appellate court to obtain a reversal of the judgment against him upon a theory involving a denial of that fact.

Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stock-

holder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability.

APPEAL from Jasper Circuit Court.—HON. JOSEPH CRAVENS, Judge.

Affirmed.

Bray filed a motion in the Jasper Circuit Court, at the September term, 1875, asking for the issuance of an execution in his favor for the sum of \$2000 and interest thereon against Seligman, alleging as the grounds of his motion: The recovery by him in said court at the November term of a judgment for said sum against the Memphis, Carthage & Northwestern Railroad Company, the issuance of an execution on said judgment returnable to the March term, 1875, of said court, and a return of nulla bona thereon by the sheriff of Jasper County; that at the date when said execution was issued Seligman was the owner of \$6,000,000 of the capital stock of said company, all of which was unpaid; that Seligman had been duly notified that application would be made at the September term, 1875, of said court, for an execution against him for the amount of the judgment so recovered as aforesaid.

Thereupon Seligman filed the following answer: Now comes Joseph Seligman, and for his answer herein to plaintiff's motion for execution against him as an alleged stockholder of the defendant corporation, says, as to whether plaintiff obtained a judgment against said corporation, and obtained an execution against the same, or as to whether said execution was returned nulla bona or not, he has not sufficient knowledge or information to form a belief. And this defendant, for further answer, says it is untrue that he ever was, or is now, a stockholder in said corporation, and says, that in truth, he never was the owner or holder of any stock in said defendant corporation, except as hereinafter stated. And he says that in the year 1872, said corporation issued certain bonds to the amount of about \$800,000, which bonds were secured by a deed of trust on all the property of said corporation; that the firm of J. & W. Seligman & Co., of New York, was made the financial agent of said corporation to negotiate and sell said bonds in the market, of which firm this defendant was a member; that one of the members of said firm, to wit, Jesse Seligman, was one of the trustees in said deed of trust; that said bonds were negotiated and sold; that said firm made large advances on said bonds and became a holder of the same to the amount of over \$400,000; that all of the property of said corporation, including its railroad, rolling stock, earnings and income, were pledged by said deed of trust, to the payment of said bonds and the interest thereon; that the capital stock of said corporation was \$10,000,000, and six millions of the said stock were deposited with said firm of J. & W. Seligman

& Co., in trust, as security for the payment of said bonds, to be held by said firm for the purpose of controlling said corporation and its organization, so that the affairs of the same should be managed honestly, and the earnings applied to the payment of said bonds and the interest thereon, and for no other purpose; said stock being the property of said corporation, to be returned to it, and was only held in trust and as additional security for the payment of said bonds, and for no other purpose; and defendant says he never subscribed for, bought or held any of the stock of said corporation, except as above stated; wherefore, he says no execution ought to issue against his property for the debt of said defendant corporation.

See note 4 Am. & Eng. R. R. Cas. 884.

BURGESS

v.

SELIGMAN and others, Ex'rs, etc.

(*Advance Case, U. S Supreme Court. January 29, 1883.*)

By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same and liable; and the estates and funds in the hands of executors, etc., shall be liable.

Held—

That persons to whom stock of a corporation is pledged as collateral security by the corporation itself are within the exemption of the statute.

That certificates of the stock, absolute on their face, issued to a creditor as collateral security, or in trust, may be shown to be so held by evidence in pais.

That the holder of such stock as collateral security, or in trust, though he vote on such stock, is not thereby estopped from showing that the stock belongs to the company and not to him, and that he only holds it as collateral security.

The Supreme Court of Missouri, after the transaction arose, and after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving stock as collateral security from the corporation itself; and this decision being urged as conclusive upon the federal courts, *held*, that this court is not bound to follow the decision of the state court in such a case.

The federal courts have an independent jurisdiction in the administration of state laws in cases between citizens of different states, co-ordinate with, and not subordinate to, that of the state courts; and are bound to exercise their own judgment as to the meaning and effect of those laws.

But since the ordinary administration of the law is carried on by the state

courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, especially with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.

But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights had accrued.

But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.

Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts.

As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

A judgment entered by consent for a specific amount, subject to any credits which the defendant may produce vouchers for, is good as between the parties themselves and their privies.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

B. H. Bristow and John P. Ellis, for plaintiff in error.

Jas. O. Broadhead and Jos. H. Choate, for defendants in error.

BRADLEY, J.—This is an action brought by the plaintiff, Burgess, against J. & W. Seligman & Co., as stockholders of the Memphis, Carthage & Northwestern Railroad Company, under a statute of the State of Missouri, to recover a debt due to him by the company. The plaintiff, in his petition, alleges that on the fifth of November, 1874, judgment was rendered in his favor against the corporation by the district court of Cherokee County, Kansas, for \$73,661, which remains unsatisfied; that in December, 1874, the corporation was dissolved; and that the defendants, at the date of the dissolution and of the judgment, were, and still are, stockholders of the corporation to the amount of \$6,000,000, on which there is due and unpaid \$1,000,000; and he demands judgment for the amount of his debt. Joseph Seligman, the principal defendant, answered, denying that the defendants were ever stockholders, or subscribers to the stock, of the corporation, and setting forth certain facts and circumstances (stated in the findings) under which the stock alleged

to be theirs was merely deposited in their hands by the corporation in trust for a temporary purpose by way of collateral security, to be returned when that purpose was accomplished.

The cause was tried by the court, and judgment was rendered for the defendants on certain findings of fact; and the question here is whether the facts as found are sufficient to support the judgment.

The principal facts upon which the case must turn are substantially the following:

The Memphis, Carthage & Northwestern Railroad Company was a corporation organized under the general laws of Missouri with an authorized capital of \$10,000,000. On the tenth of March, 1872, a contract in writing was entered into between the corporation and J. & W. Seligman & Co., (the defendants,) which is set forth in the findings. In the recitals of this contract it was stated that certain municipal subscriptions, in the shape of bonds, to the amount of \$645,000, had been obtained in aid of its construction; and that a portion of the road (27 miles) was already graded, bridged, and tied, and the right of way obtained, and all paid for by the proceeds of said subscriptions; and that the company now sought additional capital for procuring iron and equipment for the road by the sale of its first mortgage bonds. It was, therefore, agreed that the railroad company should furnish the capital necessary to completely prepare the road for the iron, and would execute and deposit with the defendants their entire issue of first mortgage bonds, to-wit, \$5,000,000, and majority of their capital stock authorized to be issued, "said stock to remain in the control of said party of the second part [J. & W. Seligman & Co.] for the term of one year at least." The latter agreed to purchase 2000 tons of railroad iron under the railroad company's direction, and from time to time to make advances of cash during the completion of the road, not exceeding \$200,000, (including the amount paid for iron,) and to receive interest thereon at the rate of 7 per cent per annum until reimbursed by sale of the bonds. They were to have the privilege for the term of 12 months of calling any portion of the five millions of bonds at the rate of 70 cents currency and accrued interest, less $2\frac{1}{2}$ per cent., and if more bonds were sold than enough to iron the road, they should advance funds to purchase rolling stock, \$2,000 per mile, the balance to remain with them on deposit, on interest at the rate of call loans, to pay any deficiency in net earnings of the road to meet demands for interest on the bonds. If the bonds, or part of them, could not, for any unforeseen cause, be negotiated during the next 12 months, the company were to repay to J. & W. Seligman & Co., all moneys advanced by them, with interest at the rate of 7 per cent per annum, and a commission of $2\frac{1}{2}$ per cent on all bonds returned. This is the purport of the written agreement.

On the 1st of May, 1872, a trust deed was executed by the company on its railroad and appurtenances to Jesse Seligman and John H. Stewart, trustees, to secure the company's bonds. On the 11th of May, 1872, the following resolution of the directors was passed: "It is ordered by the board of directors that in making negotiations for money with J. & W. Seligman & Co., certificates for a majority of the capital stock of this company be issued to the said J. & W. Seligman & Co., to hold in trust for the period of 12 months, and that such certificates be signed by the president and secretary, with the corporate seal of this company affixed." A stock certificate for 60,000 shares, or \$6,000,000, was accordingly issued in the usual form to J. & W. Seligman & Co. This certificate was delivered to the defendants, but the Court finds that they never subscribed for the stock, nor agreed to do so, and obtained it only in the manner set forth. The list of stockholders on the stock-book of the company, required by law to be kept, contains the names of certain townships which contributed aid to the road, and several individuals, including J. & W. Seligman, but not the amount of shares held. The stock transfer-book (also required by law) contained the same list, with date, number of shares, and amount carried out opposite to each name. The name of J. & W. Seligman appeared therein as follows:

NAME.	Residence.	Date.	No. of Shares.	Amount in Dollars.
J. & W. Seligman	New York, N.Y.	Dec. 20, 1872	60,000, sixty thousands (held in escrow).	6,000,000, six millions.

The Court further found that shortly after the contract of March 14, 1872, Joseph Shippen, an attorney of St. Louis, saw and examined its stock and provisions, and a few days after told Burgess (the plaintiff) of the contract, and that thereby the Seligmans were to have control of the road, and of the stock and bonds, and told Burgess it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad for its construction. Burgess accordingly saw Seligman, and testifies that the following conversation ensued: "I told him I had been constructing on that Carthage road, and that I understood he was interested in the road now, and I would like to talk to him on that matter; that this company owed me—or Cunningham, who was the president of the corporation—that he owed me then some money for work I had done between there and Pierce City, and I wanted to know what the prospect was for pushing the work forward, the means of getting the iron, and so on, and he said: 'I think the best thing you can do is to go on with the work westward, and we will have ample means to get hold of the local bonds.' It seems

Cunningham had represented to him that there was local means enough to grade the road, and he suggested to me then that I would be safe in going on and entering into such a contract, and then he mentioned that he thought it would be better for all parties if the road was built and the work prosecuted westward."

Afterwards, on June 14, 1872, Burgess entered into a contract with the railroad company for the construction of the road from Carthage, Missouri, to Independence, Kansas. He immediately began work under the contract, and so continued until the fall of 1873. The bonds of the company to the amount of \$864,000 were issued, and were negotiated and sold by J. & W. Seligman & Co., they themselves becoming holders of over \$400,000 thereof. The stock issued to them was voted on by proxy at two successive annual meetings for election of directors. The company being unable to meet its interest on the bonds, the road and property were delivered to the trustees of the mortgage and sold in December, 1874, and Joseph Seligman and Josiah Macy, as a bondholders' committee, became purchasers thereof, and the railroad corporation was dissolved, in conformity with the laws of Missouri, about the same time.

On the 5th of November, 1874, Burgess obtained judgment in the District Court of Cherokee County, Kansas, against the railroad corporation for work and materials under his contract, for the sum of \$73,661, which judgment recited that it was entered by agreement, with a stipulation that it would be entitled to a credit of the amount which had been paid by the railroad company to subcontractors and laborers of the plaintiff, when the exact amount thereof should have been ascertained and proper vouchers furnished. No credits, however, were claimed. The present action was brought to recover the amount of this judgment. The findings also set out the contract made by Burgess and his associate with the railroad company, 14th June, 1872, for constructing the road, by which it appeared that they agreed to take their pay in township bonds, so far as the same should be furnished.

Upon these facts the Court gave judgment in favor of the defendants. Burgess brings the case here by writ of error.

The statutory provision upon which the action is founded is the twenty-second section of article 1 of the act of Missouri relating to private corporations, (1 Wagner's St. c. 37,) which declares as follows:

"If any company, formed under this act, dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the company in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable."

By section 9 of article 2, of the same chapter, it is enacted as follows:

"No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable, in like manner and to the same extent, as the testator, or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name."

The first question for consideration is whether the plaintiff's claim was established. He relied on the judgment recovered by him against the corporation in Kansas. It is contended by the defendants that this judgment does not establish any debt due to the plaintiff. But we think that the objection is not sound. The judgment, as against the corporation and its privies, does establish the debt named therein as due to the plaintiff, but subject to a defeasance for such an amount as might be shown to have been paid to sub-contractors and laborers by the corporation. The defendants, as well as the corporation, were at liberty to show any credits which, by the stipulation, were properly applicable in reduction of the amount of the judgment. None such were shown, or attempted to be shown. Until such credits were shown the judgment stood valid for the whole amount. It was not for the plaintiff, but for the defendants, to show that any such credits existed.

The next and principal question is whether J. & W. Seligman & Co., or J. & W. Seligman, were stockholders of the Memphis, Carthage and Northwestern Railroad Company within the meaning of the law. Did the 60,000 shares of stock belong to them? or did they hold it by way of trust or as collateral security for the fulfillment of the company's obligations in relation to the bonds? The courts in England, and some in this country, have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guardians, or executors, or merely as collateral security. It cannot be denied that, in some cases, the extreme length to which the doctrine has been pushed has operated very harshly; and, in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force of some express provision of a statute. The Missouri statute recognizes the justice of making a discrimination between those who hold stock in their own right, and those who hold it

merely in a representative capacity, or as trustees, or by way of collateral security.

Upon a careful examination of the facts found in this case we do not see how a reasonable doubt can exist that the Seligmans held the stock in question as trustees and custodians by way of collateral security for themselves and the purchasers of the bonds. That was clearly the intent of the parties, declared in almost so many words; and that intent must prevail, unless, by some inadvertency in carrying it out, the Seligmans have been unwittingly caught in some legal snare of which the creditors can take advantage. By the contract executed between them and the corporation they were to act as its financial agents in the disposal of its bonds, and to make advances of money from time to time to enable the company to get the necessary iron for completing its road and equipment for running it. The company were to prepare the superstructure and to procure the ties, and everything necessary by way of preparation for laying the iron down; and was to do this by means of the resources it had already secured, and expected to obtain, from the township subscriptions, in order that the mortgage to be given as security for the bonds might be good and valid for that purpose; and the company further agreed to deposit with Seligman & Co. a majority of its capital stock, to remain in their control for the term of one year at least. The reasonable inference is that this deposit of stock was to be made for the purpose alleged in defendant's answer, namely, as security for the payment of the bonds, and to enable Seligman & Co. to control the corporation, and see that its affairs were honestly conducted and the earnings properly applied. The resolution of the directors, adopted for carrying out this agreement is to the same purport and effect: it directs that, in making negotiations for money with Seligman & Co., certificates for a majority of the capital stock should be issued to them to hold in trust for the period of 12 months; and when the stock was entered upon the transfer-book in the name by J. & W. Seligman, it was characterized as being "held in escrow."

The terms used may not have been strictly technical. The issuing of the stock in their names may not have been a "deposit" or an "escrow" in the strict sense of those words; but the intent is very clear that the stock was not to be regarded as their stock, but as belonging to the company, though in their names, and that it was to be held by them simply as a security. They never subscribed for the stock; they never became indebted to the company for it; the company never acquired any right to demand from them a single dollar on account of it. Though issued in form, it was only issued in a qualified sense, to subserve a specific purpose by way of collateral security for a limited period, and was returnable to the company when that purpose should be accomplished. It seems to us that the Seligmans, in taking and holding the stock, held it

merely in trust by way of collateral security for themselves and others, and that they were, therefore, within the express exception made by the law in favor of those holding stock in that way.

It is urged, however, that they are estopped from claiming the benefit of this exemption by their conduct in being represented and voting at stockholders' meetings. But if the law allows stock to be held in trust, or as collateral security, without personal liability, and if, as we suppose, the clear effect of the contract was to create such a holding in this case, we do not see how the doctrine of estoppel can apply. The only parties to complain would be the other stockholders, who might, perhaps, complain that stock held merely in trust, or as collateral security, is not entitled to participate with them in the privilege of voting. But from them no complaint is heard. Creditors could not complain, for, on the hypothesis that stock may lawfully be held at all in trust, or as collateral security, without incurring liability to them, the act of voting on the stock cannot injure or affect them. In the absence of such a law the case might be very different. Undoubtedly it has been held, in cases innumerable, that acting as a stockholder binds one as such; but that is where the law does not allow stock to be held at all without incurring all the liabilities incident to such holding. The present is an action at law based upon the supposed liability of the defendants under a statute which makes the distinction referred to, and which does not make all stockholders liable indiscriminately. We think that this makes a material difference. If the defendants can show, as we think they have shown, that they are within the exception of the statute, the statutory liability does not apply to them.

It is by no means clear, however, that J. & W. Seligman did not have a right to vote on the stock, even as against the stockholders. When the law provides that if a person holds stock as a trustee, or by way of collateral security only, he shall not be personally liable for the company's debts, it supposes that the stock shall be holden, and that the pledgee or trustee shall be the holder. If, then, the law is to have any force or effect, the mere fact of holding cannot be set up as a bar or estoppel against proof of the manner and character of such holding. And if such pledgee or trustee may be a holder of the stock in that character, is he bound to be perfectly passive in his holding? He will not be entitled to any dividends or profits, it is true, or, if he receives dividends or profits, he must account therefor; but is it certain that he may not lawfully vote on the stock? An executor, administrator, guardian, or trustee certainly may vote; and where is the rule to be found that a holder for collateral security, under a law which permits such holding, may not vote on the stock so held without losing his character as a mere pledgee? But, as before said, if the pledgee in voting the stock exceeds his rights as such pledgee, it cannot have

the effect of making the stock his own. No one is injured, and no one can complain except the other stockholders whose rights are invaded.

The line of authorities usually quoted to show that those who actually hold stock, and who manifest a voluntary or intentional holding by voting on it, or receiving dividends or other benefit from it, consists mainly of cases in which parties have been held as corporators or associates as between themselves and the corporation or joint-stock association, and as such incidentally liable to the creditors of such companies. Sir Nathaniel Lindsley, in his able Treatise on Partnership, has amply discussed the whole subject upon the platform of the English decisions. His fundamental proposition is this: "The type, then, of a member or shareholder of a company is a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the right of a member have been duly observed. . . . In practice, difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from, and membership be nevertheless constituted." Volume h, p. 128. He then devotes many pages to show, by adjudged cases, how a man may be held as a corporator by the company itself, by nolding himself out as such, as by taking dividends, etc. Now, in the present case, the relation of J. & W. Seligman & Co. to the corporation is expressly settled and fixed by the written contract between them. We have already examined that contract, and have shown that the stock issued by the corporation to J. & W. Seligman & Co. was issued to them only as trustees and by way of collateral security. The proposition that the corporation could hold them as subscribers to its stock would be in flat defiance of the contract in whole and in every part. We do not know of any iron rule of law which would prevent them from showing this contract relation between them and the company. It is the origin and foundation of their whole connection with it. The sufficiency of the evidence to control their status towards the company is another thing. Its competency seems to us free from doubt. When examined, it shows, as before stated, that as between them and the company the latter has no claim whatever against them in relation to the stock except to have it returned when properly required, after the purpose of its issue had been accomplished. It belongs to the company, and to it alone. J. & W. Seligman are mere trustees or custodians of it for a special purpose, that purpose being callateral security.

In this connection we may properly refer to the decision of the Court of Appeals of Maryland in the case of *Matthews v. Albert*, 24 Md. 527, which was a case arising upon the Maryland statute from which that of Missouri was copied, so far as relates to the exception of those holding stock in trust or as collateral security.

That was a suit in equity brought against stockholders to render them liable for the company's debts. One of them, by the name of Tieman, had loaned money to the corporation, and, as security for its payment, a certificate of stock had been issued to him. After its issue an indorsement was made on it by the president of the corporation to the effect that it had been deposited with Tieman as collateral security for the loan. The court said:

"The claim of W. H. Tieman is for \$2000, money alleged to be loaned to the company on the eighth of January, 1859. But it is insisted by the appellees that Tieman, instead of being a non-stockholding creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion his claim is for money loaned, and the stock transferred to him was held by him as collateral security for his loan, and, so holding it, he is not personally subject to any liability as stockholder, but is protected by the provision of the twelfth section of the act of 1852, c. 338."

A similar decision in a case arising upon a like statute in New York was made by the commissioners of appeal of that State in the case of *MacMahon v. Macy*, 51 N. Y. 155. The New York railroad act of 1850, as amended by the act of 1854, made stockholders liable to creditors of the company for the amount unpaid on their stock; but the eleventh section of the act contained precisely the same provision as that in the ninth section of the Missouri law, that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, should be personally subject to any liability as stockholders, imposing the liability, however, as the Missouri law does, on the pledgor or cestui que trust. Macy was sued as a stockholder, and it was shown on the trial that the stock held by him was transferred to him as collateral security. The referee refused to give any effect to this evidence, holding that parol evidence could not be received to contradict or vary the written assignments or transfers, which were absolute in form. The commissioners of appeal, on this branch of the case, said:

"In this he erred. It is always competent to show that an assignment or conveyance absolute in form, was only intended as a security. There is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock. A person may be the absolute legal and equitable owner of stock without any transfer appearing upon the books."

All the judges of the commission concurred in this opinion.

We do not well see how any different conclusion could logically have been arrived at. If the law declares that stock held as collateral security shall not make the holder liable, surely it must be competent to show that it is so held. And when this fact is once

established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants.

It is urged by the plaintiff in this case that the defendants are estopped as to him, because of a certain conversation between Joseph Seligman and himself before he entered into the contract for construction. We have carefully examined the account given of this conversation by the plaintiff himself, and we see nothing in it which at all compromises the defendants on the question of their actual status and position in the affairs of the company. Especially may this be said in view of the fact that, prior to that conversation, an attorney, who had inspected the contract of Seligman & Co., told him of it, and that it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad company for its construction. The general purport of the conversation which he afterwards had with Seligman was that Seligman advised him to take the contract and go on with the work, as the best thing for all parties, as there would be ample means to get hold of the local bonds, which would be sufficient to grade the road. Surely there was nothing in this conversation to estop the defendants from showing what their real position was with regard to the stock which they held.

But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are considering. That court, since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of *Griswold v. Seligman*, decided in November, 1880; the other, that of *Fisher v. Seligman*, decided in February, 1882, in which the former case was substantially followed and confirmed. The case of *Griswold v. Seligman* seems to have been very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority.

We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the

exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declaration of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our view with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail. *McKeen v. Delancy's Lessee*, 5 Cranch, 12; *Polk's Lessee v. Wendell*, 9 Cranch, 98; *Thatcher v. Powell*, 6 Wheat. 127; *Preston's Heirs v. Bowmar*, Id. 581; *Daly v. James*, 8 Wheat. 495; *Elmendorf v. Taylor*, 10 Wheat. 159-165; *Shelby v. Guy*, 11 Wheat. 367; *Jackson v. Chew*, 12 Wheat. 167, 168; *Fullerton v. Bank U. S.*, 1 Pet. 614; *Gardner v. Collins*, 2 Pet. 85; *U. S. v. Morrison*, 4 Pet. 136; *Green v. Neal's Lessee*, 6 Pet. 295, 300; *Groves v. Slaughter*, 15 Pet. 497; *Swift v. Tyson*, 16 Pet. 18-20; *Carpenter v. Washing-*

ton Ins. Co., Id. 511; *Carroll v. Sofford*, 3 How. 460; *Lane v. Vick*, Id. 476; *Rowan v. Runnels*, 5 How. 139; *Smith v. Kernochan*, 7 How. 219; *Nesmith v. Sheldon*, Id. 818; *Williamson v. Berry*, 8 How. 558, 559; *Van Rensselaer v. Kearney*, 11 How. 318; *Webster v. Cooper*, 14 How. 504; *Ohio Life and Trust Co. v. De Bolt*, 16 How. 431, 432; *Beauregard v. New Orleans*, 18 How. 500-503; *Watson v. Tarpley*, Id. 519; *Pease v. Peck*, Id. 598, 599; *Morgan v. Curtenius*, 20 How. 1; *League v. Egery*, 24 How. 266; *Snydam v. Williamson*, Id. 433; *S. C.*, 6 Wall. 736; *Leffingwell v. Warren*, 2 Black, 603; *Mercer Co. v. Hackett*, 1 Wall. 95, 96; *Gelpcke v. City of Dubuque*, Id. 175; *Seybert v. Pittsburgh*, Id. 273, 274; *Havemeyer v. Iowa City*, 3 Wall. 294, 303; *Thomson v. Lee*, Id. 330; 330; *Christy v. Pridgeon*, 4 Wall. 203; *Mitchell v. Burlington*, Id. 274, 275; *Lee Co. v. Rogers*, 7 Wall. 183-187; *Butz v. Muscatine*, 8 Wall. 583; *City v. Lamson*, 9 Wall. 485; *Olcott v. Sup'rs of Fond du Lac*, 16 Wall. 678; *Sup'rs v. U. S.*, 18 Wall. 81, 82; *Boyce v. Tabb*, Id. 548; *Township of Pine Grove v. Talcott*, 19 Wall. 677; *Elmwood v. Marcy*, 92 U. S. 294; *State Railroad Tax Cases*, Id. 617; *Ober v. Gallagher*, 93 U. S. 207; *Ottawa v. Perkins*, 94 U. S. 260, 267, 268; *Davie v. Briggs*, 97 U. S. 637, 638; *Fairfield v. Gallatin Co.*, 100 U. S. 47, 55; *Oates v. Bank of Montgomery*, Id. 245; *Douglas v. Pike Co.*, 101 U. S. 686, 687; *Barrett v. Holmes*, 102 U. S. 655; *Town of Thompson v. Perrine*, 103 U. S. 816; *Same Case*, Oct. Term, 1882, 1 Sup. Ct. Rep. 564, 568. [106 U. S.]

In the present case, as already observed, when the transactions in questions took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. The cases of *Pease v. Peck*, 18 How. 598, and *Morgan v. Curtenius*, 20 How. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point.

The cardinal position assumed by the state court is that, inasmuch as certificates of stock were in fact issued to and accepted by J. & W. Seligman, and they voted on the stock, they are absolutely estopped from denying that they are the owners of the stock, subject to all the liabilities incident to that relation; and that they

cannot have the benefit of the exception accorded by the law to those who hold stock as collateral security, because, as the court holds, that exemption only applies to those who have received stock in that way from some stockholder who can be made liable as a stockholder, and not to those who have received stock from the corporation itself by way of collateral security.

The first position, that the acceptance of the stock, and voting upon it, absolutely precluded the defendants from denying that they are owners of the stock, has been already considered. The great mass of authorities relied on by the Supreme Court of Missouri, on this part of the case, English as well as American, are cases in which parties have been held as corporators or associates as between themselves and the corporation, and upon that footing have been held responsible to creditors when the rights of creditors have been in question. We think that we have sufficiently shown that these authorities cannot govern the case in hand if any effect is to be given to the law of Missouri, exempting from personal liability those who hold stock in a fiduciary character, or by way of collateral security. We will, therefore, briefly examine the other position, that this law does not apply to those who receive stock as collateral security from the corporation itself.

The argument that the exemption from liability in cases of stock held as collateral security applies only to those who have received it from third persons who were stockholders, and who can be proceeded against as such, seems to us unsound, and contrary both to the words and the reason of the law. It takes for granted that stock cannot be received as collateral security from the corporation itself and still belong to the corporation, and yet we know that such transactions are very common in the business of this country. The words of the statute are positive, and relate to all holders of stock for collateral security. They are as follows: "No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company." The reason of this law is derived from the gross injustice of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property, which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions of trust where any such property is concerned. It seems to us that not only the law, but the reason upon which it is founded, applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself. It is argued, however, that the remaining words of the law are repugnant to this view. These words are as follows:

"But the person pledging such stock shall be considered as hold-

ing the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name."

The argument is that these words imply that there must always be some person or estate to respond for the stock or else the exemption cannot take effect. The obvious answer is that this clause fixes the liability upon the pledgor as a stockholder, where there is a pledgor who can be made liable in that character. When the corporation pledges its own stock as collateral security, though it cannot be proceeded against as a stockholder *eo nomine*, the reason is because it is primary liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly apply to it; but the holder of its stock as collateral security would be within both the letter and the spirit of the first clause. It is supposed that some flagrant injustice would ensue if there was not some one who could be reached as a stockholder in every case of stock pledged as collateral security; hence, stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way. Where is the justice of this? Why should the stock be necessarily considered as belonging to some one besides the corporation itself? Is any one harmed by considering the corporation as its true owner? If the stock had not been issued as collateral security, it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company have received the benefit of the moneys obtained by means of the pledge. The more closely the matter is examined, the more unreasonable it seems to deny to a pledgee of the corporation the same exemption which is extended to the pledgee of third persons. We think that the one equally with the other is protected by the express words and true spirit of the law.

We might pursue the subject further, and examine in detail the suggestions and authorities adduced by the learned court which decided the cases of *Griswold v. Seligman* and *Fisher v. Seligman*, but it is unnecessary. What we have said is sufficient to indicate substantially the grounds on which we feel obliged to dissent from its conclusions. In our judgment the facts found by the court below make out a clear case of stock held in trust and by way of collateral security only, and the judgment rendered thereon was correct.

Judgment affirmed.

See note, 4 Am. & Eng. R. R. Cas. 884.

FISHER, Appellant,

v.

SELIGMAN.

(70 *Missouri Reports*, 13.)

To sustain a claim of a right by contract to vote stock in a corporation without incurring the obligations of a stockholder, it must appear that at the time the stock was voted there was a contract in force authorizing the holder to vote it. Hence, where a corporation deposited its own unpaid and unsubscribed stock with a banking firm as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock, and after the lapse of the year the firm did vote it and thereby elected their own board of directors and so ultimately obtained complete control of the corporation; *Held*, that they thereby brought themselves within the rule of liability laid down in *Griswold v. Seligman*, 72 Mo. 110.

One who would be estopped to deny, as against a corporation, that he is a stockholder thereof, will also be held estopped as against a judgment creditor of the corporation.

No person will be regarded as holding stock as a "trustee" or by way of "collateral security," within the meaning of section 9, Wagner's Statutes, page 301, and, therefore, exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation, in the ordinary course of business.

Courts will be sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges incident to the position of a stockholder and at the same time to be exonerated from the burdens imposed by law.

Appeal from St. Louis Court of Appeals.

REVERSED.

This was a proceeding by motion under the statute by Fisher, claiming as a judgment creditor of the Memphis, Carthage & Northwestern Railroad Company, an insolvent corporation, for execution against Joseph Seligman, an alleged stockholder of the corporation. The circuit court ordered execution to issue, and from this judgment Seligman appealed to the St. Louis court of appeals, which reversed the judgment and remanded the cause. From this latter judgment Fisher appealed to this court.

The evidence given on the trial showed the following state of facts: On the 15th day of May, 1874, plaintiff obtained judgment for \$2,450 against the railroad company on an indebtedness which accrued January 21st, 1874. The company was then and ever afterward continued to be insolvent. It was organized under the general railroad law with a capital stock of \$10,000,000. Joseph Seligman was a member of the firm of J. & W. Seligman & Co.,

bankers, of New York. On the 14th day of March, 1872, this firm entered into a contract with the railroad company, which after reciting that the road had been graded, bridged and tied, and the right of way obtained for twenty-seven miles, appointed Seligman & Co., financial agents for the negotiation of the first mortgage thirty-year bonds of the company, with a stipulation on their part to make certain advances of cash to be used in completing the road; in consideration of which the company agreed to deposit with them for sale its entire issue—5,000,000—of bonds, and also a majority of the capital stock which it was authorized to issue, the stock to remain in their control for one year at least. It was further stipulated that in the event that by some cause unforeseen Seligman & Co., should not succeed in the negotiation of said bonds, or any part of them, within twelve months, the railroad company should repay all sums of money advanced with interest, and addition thereto a commission of two and a half per cent on all bonds returned by Seligman & Co.

To carry out this agreement, a deed of trust was executed on May 1st, 1872, to Jesse Seligman and one Stewart, as trustees, conveying the road and all its property and franchises, to secure bonds to the amount of \$1,900,000. This deed provided that in case of default of interest the property conveyed should be surrendered to the trustees or demand. A certificate of stock, dated May 28th, 1872, issued to J. & W. Seligman for 60,000 shares in the Memphis, Carthage & Northwestern Railroad Company of \$100 each, was produced on the trial from the possession of Seligman; as to which he testified that this stock was not paid for, or subscribed for, but issued as paid-up stock, in order that his firm might control the management of the company and the election of officers. This certificate was issued in accordance with a resolution of the board of directors ordering that, in making negotiations with the Seligmans, certificates for a majority of the stock be issued to them, to hold in trust for a period of twelve months. It was admitted that only \$800,000 worth of bonds were issued, of which the Seligmans, having made large advances on the bonds, became owners to the amount of \$400,000. Then, in 1873, at a meeting of the Seligmans and other bondholders in New York, at which Judge Baker was present, it was agreed that Baker should become a director and president, with a view to protecting the bondholders. A proxy was accordingly made out by the Seligmans and handed to Baker, which proxy was voted by Mr. Blow for the Seligmans at the annual election in March, 1874, at which election Baker named the ticket, Seligman being named as one of the directors and Baker as another. The ticket was elected; Judge Baker then became president. Baker testified that the Seligmans knew, in a general way, of these acts, and that from the time of his connection with the road to the foreclosure of the mortgage, the road was con-

trolled by the 6,000,000 of stock issued to the Seligmans. During the ten months that Judge Baker was president of the road, he did not apply its earnings to the payment of interest. The newly elected directors held only one meeting, which was held in October, 1874, under the presidency of Judge Baker; at which meeting they did only one thing, that is, they turned over the road to the trustees in the mortgage for non-payment of interest. The stock book of the road, which contained merely the list of stockholders, without the number of shares, showed the namer J. & W. Seligman as stockholders. The transfer book has the following entry:

NAME.	RESIDENCE.	DATE.
J. & W. Seligman.	New York, N. Y.	May 29th, 1862.
NO. OF SHARES.	AMOUNT IN DOLLARS.	
60,000. Sixty Thousand.	6,000,000. Six Million.	

(Held in Escrow)

These books were kept in obedience to the requirements of the corporation law of the State. Wag. Stat., 300, § 8.

Joseph Shippen for appellant.

This case is governed by the case of *Griswold v. Seligman*, 72 Mo. 110, and the numerous authorities therein cited. Defendants became and were stockholders in said railroad company, and in all respects liable as such, despite their secret agreements. *Thompson on Stockholders*, §§ 124, 129; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Burke v. Smith*, 16 Wall. 390; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 67; *In re Empire City Bank*, 18 N. Y. 199; *Hatch v. Dana*, 101 U. S. 205; *County of Morgan v. Allen*, 103 U. S. 498. Defendants' conduct and acts estop them from making the defenses herein attempted. (1) By accepting and holding said absolute and unconditional certificate. *Thompson on Stockholders*, §§ 105, 161, 171; *Upton v. Tribilcock*, 91 U. S. 48; *Upton v. Englehart*, 3 Dill. 496; *Pickering v. Templeton*, 2 Mo. App. 424; *Van Cott v. Van Brunt*, 2 Ab. New Cas. 283. (2) By voting said 60,000 shares of stock. *Thompson on Stockholders*, § 160; 1 Wag. Stat., sub. 5, § 6, p. 300; *In re Reciprocity Bank*, 22 N. Y. 17; *Eaton v. Aspinwall*, 19 N. Y. 119; *Upton v. Tribilcock*, 91 U. S. 48. (3) By electing himself a director, and accepting and holding such position. 1 Wag. Stat., p. 299, § 6. Section 771, Revised Statutes 1879, has no application to this case. *Thompson on Stockholders*, § 224; *Stover v. Flack*, 30 N. Y. 70; *Johnston v. Laffin*, 6 Cent. L. J. 133; *Pullman v. Upton*, 96 D. S. 328; *National Bank v. Case*, 99 U. S. 628; *Brewster v. Hartley*, 37 Cal. 15; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344; s. c. 7 Am. Rep. 137; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Holyoke*

Bank v. Burnham, 11 Cush. 183; *In re Empire City Bank*, 18 N. Y. 199; *Rosevelt v. Brown*, 11 N. Y. 148; *Newry Ry. Co. v. Moss*, 14 Beav. 64.

John P. Ellis for appellant.

The control of a corporation can never be legally surrendered to its creditors, secured or unsecured. Where one, whether creditor or not, contracts with a corporation for its control through the use of a majority of its stock, receives the stock with the intention of using it for that purpose, afterward so uses it, and thereby acquires full corporate control, he has deliberately done that which can be done only by a stockholder. Having bargained for, used and enjoyed the privileges of a stockholder, he ought to be held to a stockholder's liability. One who holds, uses and votes stock for his own benefit, holds the stock cum onere, and to the extent of his interest is individually liable to the creditors of the corporation whose stock he so uses. *Maguire's case*, 3 DeG. & Sm. 31; *Bunn's case*, 2 DeG. F. & J. 295; *St. Charles Manfg. Co. v. Britton*, 2 Mo. App. 290; *Webster v. Upton*, 1 Otto, 68; *Sawyer v. Upton*, Otto, 56; *Upton v. Tribilcock*, 1 Otto, 45; *Re Bachman*, 12 B. R. 223; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Sawyer v. Hoag*, 17 Wall. 610; *Wheelock v. Kost*, 77 Ill. 296; *Pullman v. Upton*, 6 Otto, 328; *Am. Ry. Frog Co. v. Haven*, 101 Mass. 398; *Farrar v. Walker*, 3 Dill. 506; *Schaeffer v. Mo. Home Ins. Co.*, 46 Mo. 248; *Adderly v. Storm*, 6 Hill, 624; *Smith v. Heidecker*, 39 Mo. 157. It may be true that defendant could not have compelled the railroad company to permit him to vote his stock. But the company waived objection, accepted the defendant as a legal stockholder, and gave him full control of the corporation. Under these circumstances the defendant cannot be heard, even against the corporation, to dispute his conduct as a stockholder, much less against a creditor. *Holyoke Bank v. Goodman Paper Manfg. Co.*, 9 Cush. 576; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Barrett v. Schuyler Co.*, 44 Mo. 197; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibility of a shareholder. In this case, in addition, the name of defendant's firm appeared in the list of stockholders required to be kept by the statute. 1 Wag. Stat., p. 300, § 6; *McLaughlin v. Detroit R. R. Co.*, 8 Mich. 100; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *Pullman v. Upton*, 6 Otto, 328; *Upton v. Tribilcock*, 1 Otto, 47, 48; *Rosevelt v. Brown*, 1 Kernan 151; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing, etc., Co.* 15 Gray, 219; *Hoagland v. Bell*, 36 Barb. 57; *R. & W. Turnpike Co. v. Van Ness*, 2 Cranch C. C. 449; *Trumbull v. Payson*, 5 Otto, 418. The actual delivery of stock cuts out the defense that it was in escrow. *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4. A false entry upon the corporate books,

in respect to the ownership of stock will not avail the real owner as a defense against creditors. *Castleman v. Holmes*, 4 J. J. Marsh, 1; *Roman v. Fry*, 5 J. J. Marsh, 634; *Sanger v. Upton*, 1 Otto 60; *Chaffin v. Cummings*, 37 Me. 76; *Harvey v. Kay*, 9 B. & C. 356; *Adderly v. Storm*, 6 Hill, 624; *Schaeffer v. Ins. Co.*, 46 Mo. 248; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Corwith v. Culver*, 69 Ill. 502; *Ruggles v. Brock*, 6 Hun (N. Y.), 164.

Section 9, page 301, 1 Wagner's Statutes, being section 771 Revised Statutes 1879, is by its terms applicable only to cases where some one other than the corporation remains liable to the creditors. So in case of collateral security, "the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder;" and in case of a trust, "the estate and funds in the hands of such . . . trustee shall be liable." It is absurd to attribute the intention to the legislature of making the corporation liable as a stockholder, for it cannot be its own stockholder. *American Ry. Frog Co. v. Haven*, 101 Mass. 398; a. c., 3 Am. Rep. 377; *Dayton & Cin. R. R. Co. v. Hatch*, 1 Disney, 84; *State v. Smith*, 48 Vt. 266; *Ex parte Holmes*, 5 Cow. 426; *Brewster v. Hartley*, 37 Cal. 15; *Wheelock v. Kost*, 77 Ill. 296; *Pullman v. Upton*, 6 Otto, 328; *Johnston v. Laffin*, 103 U. S. 800. Moreover, this stock was never pledged as collateral security; no rights of pledge were vested in the pledgee; no power of sale or other disposition. The deposit of stock was, in the answer, "to enable the defendant to control the organization of the corporation and the election of its officers." It is impossible to conceive of the control of a corporation being held as collateral security, and to understand how the stock, which accomplishes this control, has no owner or holder. The protection of the creditor is the paramount object the legislature had in view, and the act ought to receive such construction as will best accomplish this purpose. *Hager v. Cleveland*, 36 Md. 491. Outside the operation of this statute, the law is well settled that the ostensible owner of stock is liable to the creditors, notwithstanding he may in fact have held only in trust, or as collateral security. *Pullman v. Upton*, 6 Otto, 328; *Holyoke Bank v. Burnham*, 11 Cush. 181; *Albert v. Savings Bank*, 1 Md. Ch. 407; *Matter of Empire City Bank*, 18 N. Y. 210; *Brewster v. Sime*, 42 Cal. 139. But supposing section 9 does apply to the case at bar, and the Seligmans, as trustees or pledgees, are not liable, still they were trustees or pledgees for themselves to the amount of at least \$400,000, to which extent they are expressly charged by the statute with the payment of corporation debts.

Harding & Buller and R. E. Rombauer, for respondent.

There never was a contract between defendant and the corporation making defendant a stockholder. *Brewster v. Hartley*, 37 Cal. 15; *Seymour v. Sturgess*, 26 N. Y. 134, 145; *Pittsburgh and S. R. R. Co. v. Gazzam*, 32 Pa. St. 340. And defendant can show

aliunde the stock certificate, and even the books of the corporation, under what circumstances the certificate was issued to J. & W. Seligman & Co. *McMahon v. Macy*, 51 N. Y. 155, 161; *Tonica, etc. R. R. Co. v. Stein*, 21 Ill. 96, 98; *Lathrop v. Kneeland*, 46 Barb. 432, 438; *Jones v. Portsmouth R. R. Co.*, 32 N. H. 544; *Pittsburgh, etc., R. R. Co. v. Stewart*, 41 Pa. St. 54. Defendant is not estopped from asserting that he is and was not a stockholder, no act of his having induced plaintiff to alter, injuriously to himself, his previous condition. *Bigelow on Estoppel*, p. 473, 560; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Howard v. Hudson*, 2 El. & B. 1; *Kinney v. Farnsworth*, 17 Conn. 355; *Cummings v. Webster*, 43 Me. 192; *Heath v. Derry Bank*, 44 N. H. 174; *Brown v. Wheeler*, 17 Conn. 345. The proceeding is statutory and in derogation of the common law. The plaintiff must establish that defendant is liable under the statute, which he has failed to do. 1 Wag. Stat., p. 301, § 9; *McMahon v. Macy*, 51 N. Y. 155, 161; *Skouten v. Wood*, 57 Mo. 382.

Broadhead, Slayback & Hauessler, also for respondent.

It requires the assent of the corporation before an individual can become a member of it, and this generally must be done either by subscription to the stock of the corporation, or by a transfer to him on its books, and with its consent. In no other way can an individual become a member of the body corporate, and it is only as such a member of the body corporate that our statute intends that he should be held liable for the debts of the corporation. It is true that a man may so act in regard to third persons, as to be estopped from denying that he is a member of the corporation, and liable as such, but in that case he must have so acted as to cause third persons to incur liabilities, or sustain losses, upon the idea that he is a member.

I.

SHERWOOD, C. J.—In the case of *Griswold v. Seligman*, 72 Mo. 110, the legal points involved in the present record were fully discussed, and the rulings there made are decisive of the case before us. Inasmuch, however, as those points have been re-argued in this instance, we have thought best to so say somewhat more concerning them.

It was conceded in argument, by counsel for defendants, that if a party without any contract therefor, assumes the attitude and privileges of a stockholder; assuming unwarrantably the exercise of such privileges; assumes to vote as a stockholder, that thereby he will take upon himself all the burdens and liabilities incident to such a position. But the contention is made that here there was a written contract entered into between the corporation and J. & W. Seligman & Co., of which firm Joseph Seligman was a member. The record shows there was indeed a contract entered

into as contended, but of what avail is such a contract, when it contained no provision that the members of the firm should acquire the rights of stockholders? It is not manifest that this being so, the case must stand as if no such contract had been entered into? We cannot regard the matter in any other light. In a word, it is but the assertion of a truism to say that a contract which does not confer a right, cannot be relied on to support or uphold the exercise of such right; cannot be looked upon, so far as concerns that particular right, as any contract at all. The case stands here then on this point precisely as did the Griswold case; that of a party who votes as a stockholder, and, when the endeavor is made to fasten upon him the customary liability arising from such conduct, attempts to shelter himself under a contract giving him the alleged right to vote as a stockholder; but which contract when examined, is bare and barren of any such provision. But even if the contract gave such a right, a right to vote the stock, that contract expired by its own terms and limitation, in one year from the reception of the stock, May 29th, 1873, so that in any event, the voting of the stock, occurring, as it did, after Seligman ceased to have any right to hold the stock as trustee, such voting was wholly unauthorized, and must, therefore, be attended by those consequences to which we have heretofore adverted.

II.

As to Joseph Seligman being estopped from denying that he is a stockholder, we hold, as we did before, that he is thus estopped. The fact that Seligman did not hold himself out to the world as a stockholder; the fact that Fisher, the creditor, at the time he gave credit, was not aware of Seligman's liability, is a matter altogether immaterial. If Seligman so conducted himself toward the corporation as to preclude himself from denying as to the corporation, that he was a stockholder, by the same steps he estopped himself as toward any creditor, who, under our law, succeeds and is subrogated to the corporate rights and assets. And there is nothing novel in this application of the doctrine of estoppel. Subrogated as the creditors are, to the rights of the insolvent corporation, among those rights will be included those acquired by reason of estoppel as well as those acquired in the ordinary way. The authorities cited in the Griswold case fully sustain and illustrate this. Nothing is more common in the law of estoppel than that a party estopped as toward a particular person, is likewise estopped against all claiming under or in privity with such person. In instances like the present, the creditor claims under, represents and stands in the shoes of the corporation, and doing this, is entitled to advantage himself to the same extent as could the corporation. According to the authorities cited on a former

occasion, already referred to, had Seligman been sued for calls, it would not have lain in his mouth after assuming to act as a stockholder, to resist such action by denying what he had before by his conduct asserted.

III.

Nor are our views changed as to the effect of section 9, Wagner's Statutes, page 301. "No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estates and funds, in the hands of such executor, administrator, guardian or trustee shall be liable, in like manner and to the same extent as the testator or intestate, of the ward or person interested in such fund would have been if he had been living and competent to act, and held the stock in his own name. Joseph Seligman cannot be regarded as holding the stock in the capacity of "trustee," nor as holding it as "collateral security," within the meaning of that section. This section, according to the plain import of its terms, relates to stock already issued in ordinary course of business, and which subsequently comes into the hands of either a trustee of some person laboring under a disability, as ex. gr., a femme covert, or into the hands of the administrator of the estate of some decedent, or into the hands of a guardian of some infant; or, lastly, into the hands of a pledgee as "collateral security." In the last instance the "person pledging such stock shall be considered as holding the same and liable as a stockholder accordingly." This person is the pledgor, and is "personally subject to. . . liability as a stockholder of such company."

It is not pretended here that there is any person who pledged this stock—that any person is liable thereon; and so it is not possible that the statute in question should apply. In every case of pledging stock, within the meaning of the statute, there must be a stockholder whom the law, notwithstanding he has pledged his stock, still considers as occupying his original attitude and responsibilities, and, therefore, looks to him and holds him individually answerable. The bare statement of this case shows no such individual pledgor; no person against whom the creditor, if remediless in consequence of the insolvency of the corporation, could seek redress. He might recover judgment; he might have an execution issued; that writ be returned *nulla bona*, but when he had gone to such legal extremity, he would, if a certain theory is to prevail, find that though stock in abundance had been issued, that though it had been pledged, that no one was responsible on that stock either as pledgor or as stockholder.

But enough on this point. Take another instance mentioned in this section and the view becomes no better for Seligman. He is a "trustee," it is said, but who is his cestui que trust? What "estates and funds in the hands of such. . . trustee," are there, which can be made "liable in like manner and to the same extent as the. . . person interested in such fund would have been if. . . competent to act and hold the stock in his own name?" Is it not plain that the statute, when speaking of the "estates and funds" of the person beneficially interested, does not and cannot refer either to the corporation or to the assets and funds thereof? If it does not thus refer, then this of itself must conspicuously show both that there were no "estates and funds" in the hands of the alleged trustee, and that of consequence, he is not the sort of fiduciary whom the section exempts from liability.

That section treats of two and only two kinds of liability; one personal, that imposed on the pledgor of stock; the other, that imposed on the estates and funds of him "who if. . . competent to act," would have "held the stock in his own name." This record presents neither kind of liability, and as it does not, there are no circumstances upon which section 9 can operate. This being the case, that doctrine is properly invoked here, which declares that a person who assumes the anomalous attitude of a trustee, when representing no cestui que trust, becomes personally liable. This principle finds apt illustration in *Johnston v. Laffin*, 5 Dill. 65. Britton bought stock with the bank's funds and had it registered in the books as held by "Britton trustee for the bank;" and because there was no cestui que trust who could become liable, the liability incurred was fastened on the party who unwarrantably assumed to act as fiduciary.

IV.

There have been many devices, many schemes, many cunningly devised transactions whereby men have sought to receive every benefit and yet shirk every burden incident to the position of a stockholder, but such devices have generally come to naught. The courts have been sedulous in their endeavors to bring about such a result. We have no doubt that the matters set forth in this record are of the nature indicated, and we cannot better illustrate our views than by quoting the language of the learned judge of the Court of Appeals: "A method of issuing bonds and selling no stock, but issuing paid-up stock, on which nothing has ever been paid to the bondholder, who is to vote the stock, and when called by a creditor, to say that though nothing has ever been paid on the stock, and no one is liable upon it; that his voting was illegal though it gave him control of the road; and that he merely held the stock as collateral though it represented no indebtedness of anybody, no property, and nothing but a right to vote—would

seem to be an ingenious evasion of the law." So say we, and, therefore, reverse the judgment of the Court of Appeals and affirm that of the Circuit Court. Hough and Ray, JJ., concur; Henry, J., as heretofore; Norton, J., dissents.

DISSENTING OPINION.

NORTON, J.—This case, so far as the questions in it are concerned, is on all fours with the case of *Griswold v. Seligman*, 72 Mo. 110. For the reasons given in my dissenting opinion in that case, which it is not necessary here to repeat, I do not agree to the opinion and judgment rendered in this case.

See note 4 Am. and Eng. R. R. Cas. 884.

SANTA CRUZ R. R. Co., Appellant.

v.

SPRECKLES, Respondent.

(*Advance Case. California. June 30, 1882.*)

A corporation has no authority to levy an assessment on capital stock fully paid up.

Plaintiff, against & against, for assessment.
Jarboe & Harrison, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover of the defendant, who was a subscriber for a number of shares of the capital stock of the plaintiff corporation, an assessment levied by the directors of the corporation to pay a debt due it. The defendant's stock had been fully paid up.

The facts fully found by the court had best be here inserted, and they are as follows:

"1st. That said plaintiff is, and was at the several times herein mentioned, a railroad corporation, and is duly organized, incorporated, acting, and existing under and in pursuance of the laws of said state; that said plaintiff was duly incorporated and organized on or about the 18th day of June, A.D. 1873, by the name of 'Santa Cruz R. R. Co.,' for the term and duration of fifty years from the date of its incorporation, for the purpose of constructing, owning, operating, and maintaining an iron railroad in said state, upon the general route commencing at a point near the Pajaro station on the Southern Pacific Railroad, and running thence to and through the county of Santa Cruz, crossing the San Lorenzo river between the county road leading to Watsonville and the bay of Monterey,

and thence along or near the coast to the northern boundary of Santa Cruz County, at or near the south boundary of the rancho 'Point Ano Nuevo.' The plaintiff's principal place of business and principal office is at the city of Santa Cruz, in said county of Santa Cruz, in said state.

2d. That the capital stock of the plaintiff is one million dollars, and is divided into ten thousand shares of one hundred dollars each.

3d. That on and prior to the 10th day of April, A.D. 1878, there had been subscribed of the said shares of said capital stock the number of five thousand and ninety-five and one half shares, upon each of which shares the sum of one hundred dollars had been paid by the respective subscribers, and that the plaintiff had issued to the said subscribers certificates for the stock so subscribed.

4th. That of the stock so subscribed the defendant had, prior to the 10th day of April, 1878, subscribed for, and was, on and prior to said 10th day of April, 1878, the owner and holder of 1605 of the said shares, and that the said 1605 shares of said stock stood upon the books of the plaintiff in the name of said defendant, and that certificates therefor had been, by this plaintiff, issued to and accepted by this defendant.

5th. That the said defendant had, prior to the 10th day of April, 1878, paid to the plaintiff the full and par value of each of said 1605 shares of its capital stock, viz., the sum of \$100 for each of said 1605 shares, viz., the full amount of money subscribed by him therefor.

6th. That the first section of said plaintiff's railroad consists of that part of said railroad between said Pajaro station and said city of Santa Cruz, and is twenty-one and one-third miles long. That on and prior and subsequent to the 10th day of April, A.D. 1878, said first section of said plaintiff's railroad was in running order and equipped with locomotives and cars and operated daily with locomotives and cars for the carriage of passengers and the transportation of freight.

7th. That on the 10th day of April, 1878, the plaintiff was indebted as follows, in an amount exceeding \$70,000, viz.:

The said indebtedness was made up of the following items:

Sundry accounts.....	\$953 46
Balance due Southern Pacific R. R. Co.....	897 68
Balance due A. F. Richardson.....	42 28
Amount due F. A. Hihn.....	66,705 50
Overdrafts on bank accounts.....	7,664 51

In addition to the above indebtedness of the plaintiff, it had, in September, 1875, issued certain bonds to the amount of \$125,000, payable October 1, 1880, secured by a mortgage of its road and rolling stock, with interest coupons payable semi-annually, viz., April 1st and October 1st of each year, and which bonds were un-

paid. Of the interest coupons upon said bonds there was, on the 10th day of April, A.D. 1878, the sum of \$7,450 in arrears and unpaid, a portion of which had matured on the 1st day of October, 1877, and a portion on the 1st day of April, 1878.

8th. F. A. Hihn, in whose favor there was the aforesaid item of indebtedness of \$66,705.50, had been from the time of the incorporation of the plaintiff, until after the 10th day of April, 1878, and was, on that day, a director of the plaintiff and its president.

9th. The indebtedness of plaintiff to the said F. A. Hihn was incurred as follows:

For cash advanced to the plaintiff.....	\$46,682 15
For materials sold to the plaintiff.....	7,745 82
For coupons unpaid upon aforesaid bonds.....	7,150 00
(These last named coupons are not the same as those mentioned in the 7th paragraph.)	
For land for depot and right of way, sold to the plaintiff.....	7,940 29
For interest credited to him.....	5,426 94
For salary.....	633 89
For orders on plaintiff by some of its creditors in favor of him.....	812 62

Upon said amounts payments had been made from time to time, leaving a balance due of \$46,705.

Full statements of accounts between F. A. Hihn and the plaintiff, were by the plaintiff's directors presented to the stockholders of plaintiff at their annual meetings in 1876-77-78, and by said stockholders approved and adopted. The defendant was not present at any of said meetings of stockholders, either in person or by proxy, and took no part in the action of said stockholders in reference to said statements or accounts.

The purchase of the depot lands and right of way from Hihn was negotiated, by the directors of plaintiff, at the meeting on the 27th day of May, 1876, at which meeting defendant Spreckles was present, and acted as director, and was a director of the plaintiff.

The said money was advanced and the supplies furnished by said Hihn, at the request of Titus Hale, who was a director of the plaintiff, and who, with said Hihn, constituted the Executive Committee of the plaintiff. At the time the money was advanced, the plaintiff was out of money and in debt, and unable to borrow money or procure supplies from any other source, and the money and supplies were used by this plaintiff.

Said Hihn had been credited from September, 1879, about half the time, upon the books of the plaintiff, with interest upon his account at the rate of 1 per cent per month, which was placed to his credit at the end of each month, and upon which interest was thereafter computed at the same rate, this being the rate of interest charged and mode of computation in use at that time by the bank.

Said Hihn was also, during said time, the owner of 2415 shares of stock of the plaintiff, and has ever since owned the same. At a

meeting of the directors of the plaintiff, on the 10th day of April, 1878, the following action was taken upon said account, and the same appears upon the records of the plaintiff:

'The accounts between the company and F. A. Hihn from the date of the last examination, July 1, 1877, to this date, were then examined and found correct, and there was found to be due to said Hihn from the company the sum of sixty-six thousand seven hundred and five and fifty one-hundredths (\$66,705.50) dollars. It is therefore ordered that the secretary of the company certify to the examination and auditing of such account, and to the amount due thereon; and that such certificate be endorsed on the rendered statement of said account.'

Said approval was thereafter endorsed upon the account by the secretary of the plaintiff under the seal of the plaintiff.

10th. On the 10th day of April, 1878, the directors of the plaintiff passed the following resolution:

'For the purpose of paying the debts of the company it is ordered that an assessment of ten dollars (\$10) shall be, and hereby is levied on each share of the subscribed capital stock of the Santa Cruz R. R. Co., which assessment shall be payable to T. Hale, treasurer of said company, at the office of said company, on Park street, in the city of Santa Cruz, county of Santa Cruz, State of California, on the 20th day of May, A.D. 1878. Any portion of said assessment remaining unpaid on the 20th day of May, 1878, shall become delinquent. Any stock upon which this assessment shall remain unpaid on the said 20th day of May, 1878, will be delinquent, and will be advertised for sale at public auction, and unless payment is made before, will be sold on the 20th day of June, 1878, to pay the delinquent assessment, together with costs of advertising and expenses of sale.'

11th. That at and subsequent to the time of the making of said last named order, plaintiff's secretary was and is Amasa Pray. That upon the making of said last named order said Secretary of plaintiff caused to be published in the newspaper, and for the length of time hereinafter mentioned, a notice, of which the following is a copy, to wit:

NOTICE OF ASSESSMENT.

Name of the corporation in full: 'Santa Cruz R. R. Co.' Location of principal place of business: City of Santa Cruz, county of Santa Cruz, State of California.

Notice is hereby given that at a meeting of the directors of the Santa Cruz R. R. Co., held on the 10th day of April, A.D. 1878, an assessment of ten dollars (\$10) per share was levied upon the capital stock of the said corporation, to wit: the said Santa Cruz R. R. Co., payable on the 20th day of May, A.D. 1878, to T. Hale, treasurer of said company, at the office of said company, on Park street,

in the city of Santa Cruz, county of Santa Cruz, and State of California.

Any stock upon which this assessment shall remain unpaid on the said 20th day of May, 1878, will be delinquent, and advertised for sale at public auction, and unless payment is made before, will be sold on the 20th day of June, A.D. 1878, to pay the delinquent assessment, together with costs of advertising and expenses of sale.

In witness whereof I have hereunto set my hand and affixed the seal of said corporation, on this the 10th day of April, 1878.

[SEAL.]

AMASA PRAY, Secretary,

Location of office—At railroad depot, on north side of Park street, in the said city of Santa Cruz.

That a copy of said last named notice was personally served on said defendant at the city and county of San Francisco, in said State, on the 22d day of April, A.D. 1878. That a copy of said notice, inclosed in an envelope, and addressed to said defendant, at his place of residence in said city and county of San Francisco, in said State, and the postage thereon prepaid, was deposited in the post-office at the said city of Santa Cruz, on the 20th day of April, A.D. 1878, by said secretary. That copies of said last named notice, inclosed in envelopes and addressed to each stockholder of plaintiff at his place of residence, and the postage thereon prepaid, was, on the 20th day of April, A.D. 1878, deposited by said secretary in the post-office at said city of Santa Cruz. That said last named notice was published once a week for four successive weeks prior to the 20th day of May, A.D. 1878, to wit: on the 20th and 27th days of April, A.D. 1878, and on the 4th, 11th, and 18th days of May, 1878, in a newspaper of general circulation, and devoted to the publication of general news, and known as and called the *Santa Cruz Sentinel*, and published at the place designated in plaintiff's articles of incorporation as plaintiff's principal place of business, to wit, said City of Santa Cruz.

12. That said defendant has not paid said assessment of ten dollars per share, or any part thereof, on said 1605 shares of plaintiff's capital stock, or on any part or portion or share thereof.

13th. That on the 22d day of May, 1878, the directors of plaintiff adopted the following resolutions:

'It appearing that a large part of the assessment levied by this Board on the 10th of April, 1878, remains unpaid, and has become delinquent, it is therefore ordered that the Board of Directors hereby elect to waive further proceedings under Chapter II. Title I. of Part IV. of the Civil Code of the State of California, for the collection of delinquent assessments, and hereby do elect to proceed by action to recover the amount of all such delinquent assessments. And it is further ordered that the secretary omit the publication of notice of sale for said delinquent assessment. And it is further

ordered that the president cause the collection of said delinquent assessment to be enforced by action.'

14th. That the nominal capital stock of the plaintiff, and the amount of its capital stock named in its articles of incorporation, is one million dollars, divided into ten thousand shares of one hundred dollars each, and that the plaintiff has never issued or sold or received subscriptions for or disposed of more than 5095 $\frac{1}{4}$ shares of its said capital stock, but still retains undisposed of and unissued 4904 $\frac{1}{4}$ shares of its said capital stock.

That the plaintiff has not been able to sell any more of its stock than the aforesaid number of 5095 $\frac{1}{4}$ shares thereof, and that the railroad of the plaintiff, except the first section, has not been completed, and that no portion of the said railroad has been built since the 1st of January, 1877.

15th. That the plaintiff has never fixed its capital stock at any amount other than the original amount of one million dollars. Nor has it taken any steps in accordance with the provisions of Section 458 of the Civil Code of this State, nor has there ever been any certificate, other than plaintiff's articles of incorporation, filed in the office of the Secretary of State, stating the amount of its fixed capital stock, and that the whole thereof has been paid in."

The court rendered judgment for defendant, and plaintiff appealed.

The contention of defendant is that no assessment can be levied on stock fully paid up, and this presents the only point to be considered.

The power in regard to assessments of capital stock is defined by Sections 331 and 332 of the Civil Code, which are in these words:

"Sec. 331. The directors of any corporation formed or existing under the laws of this State, after one fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein.

"Sec. 332. No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the case in this section otherwise provided for, as follows:

"1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

"2. The directors of railroad corporations may assess the capital stock in instalments of not more than 10 per cent per month, unless in the articles of incorporation it is otherwise provided.

"3. The directors of fire or marine insurance corporations

may assess such a percentage of the capital stock as they deem proper."

It will be observed that the authority to levy and collect assessments is given by the first section quoted.

They may be levied and collected upon the capital stock subscribed, after one fourth of it has been subscribed, for the purpose of paying expenses, conducting business, or paying debts, but no further than provided by the code. (Sec. 331, C. C.) The power to assess is thus limited to the capital stock subscribed. The extent to which this power may be exercised is declared in Section 332, and it cannot fail to arrest the attention upon a careful perusal of the section, that when a corporation is unable to meet its liabilities, or to satisfy the claims of creditors, the assessment can only be for the amount unpaid on the capital stock, and when necessary to discharge the debt or liability, it may be for the full amount unpaid on the capital stock, even though it exceed the ten per cent limitation in the first clause of the section. But nowhere can be found any power to exceed the amount unpaid on the stock though the debts exceed the sum which may be thus raised. The two sections read together limit the power to assess to the unpaid amount due on the capital stock subscribed for, even though the amount which may be thus realized is insufficient to discharge the debt or liability of the corporation.

The creditor contracts under the law as it is written. He is notified in advance of his entering into any engagement with the corporation of the means to which the corporation can resort to raise the money for his payment. When his debt exceeds the amount which the corporation through its lawful agents can raise for his satisfaction, he can resort to his remedy by action against the stockholders under Section 322 of the Civil Code for the recovery of the amount due him, or such other means of relief as the law supplies. The second subdivision of Section 332 only refers to the 10 per cent limitation, which may be done away with by a different provision in the articles of incorporation. But the language of this subdivision enforces the conclusion above reached and expressed, by the limitation of the power of assessment of the capital stock in instalments. This last word plainly refers to instalments of the capital stock, and of that only, and confines the power to instalments of the amount so fixed.

It follows from the foregoing that the judgment must be affirmed, and it is so ordered.

We concur: Myrick, J., McKinstry, J., McKee, J.

THE HOUSTON AND TEXAS CENTRAL RY. CO.

v.

MARIE VAN ALSTYNE, Executrix.

(56 Texas Reports, 439, 1883.)

After a sale of stock in a railroad company by the owner to whom the certificate had issued, the sale being evidenced by assignment and delivery of the certificate, and after the purchaser had surrendered said certificate to the company and received in lieu thereof a certificate in his own name, the transaction being properly evidenced on the books of the corporation, the original certificate and the rights of the original owner were extinguished, so that a subsequent assignment of said stock by said original owner to another party would pass no right or title thereto.

If by mistake a new certificate of stock has also issued to the second assignee, he not being purchaser for value and without notice, will not be entitled to the rights of an owner of stock.

It seems that this is so, although the first purchaser was the secretary of the company, and as such by mistake issued the certificate to the second assignee.

The second assignee, being a director of the company and in a position to know its affairs, cannot avail himself of the mistake.

The railroad company had resolved to increase its stock eight-fold by substituting for the original certificates new certificates on the basis of eight for one; *held*, that a suit by the second assignee to enforce his right to these new certificates was substantially a suit for special performance.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Appellee instituted this suit in September, 1879, to recover of defendant forty shares of its capital stock or their value in money.

It was agreed that prior to 1861 defendant had issued a certificate for five shares of stock to one L. L. Bartlett, and that the plaintiff claimed through an assignment of that stock in 1866 to to her testator by Bartlett, and she alleged, and it was admitted as true, that afterwards, in 1866, her testator presented the assignment to defendant's board of directors, and that they issued to him, as assignee of Bartlett, a certificate for said five shares, which the plaintiff "now holds."

It was further alleged and admitted as true, that since then the defendant, by proper action, has determined to issue to each of its stockholders eight shares of new stock in its company for each share previously issued, which entitled plaintiff to forty shares of the new or present capital stock in defendant's company in lieu of the five shares issued to her testator as assignee of Bartlett, if in law she is entitled to recover anything on account of the Bartlett stock.

The defendant alleged that Bartlett assigned the same stock to

William R. Baker in 1861, of which the plaintiff's testator had notice. That in 1861 Baker presented the assignment and surrendered the certificate issued to Bartlett to defendant's officers, and they issued to him as assignee of Bartlett a certificate for said five shares, which he still held, and then averred that the plaintiff's testator was a director in defendant's company at the time he took the assignment from Bartlett and that he fraudulently procured said officers to issue the certificate through which the plaintiff claimed, and the same was issued in mistake; wherefore plaintiff was not entitled to forty shares of new stock in place of the five shares of Bartlett stock.

It was also proved that the transfer from Bartlett to Baker was among the records of the company; that Van Alstyne was a director in the railroad company from 1860 to 1867, and during that time his place of business was in the general office of the company and he had access to the records of the office; that Baker was secretary of the company in 1866, when the certificate for the Bartlett five shares was issued to Van Alstyne; that the issuance to the latter was an oversight on his (Baker's) part; and that he did not remember having previously bought the stock.

For the plaintiff it was admitted that she was executrix of William A. Van Alstyne; that Bartlett assigned his five shares to her testator in 1866; that in that year defendant's officers issued to him on that assignment, as assignee of Bartlett, a certificate for said five shares, and that William R. Baker was a director and the secretary of defendant at the time, and that said shares were worth at the trial, the amount at which the Court estimated them in its judgment, to wit, fifty-two dollars per share of \$100 each.

It was proven that plaintiff's testator was a director in defendant's company during all of 1866, and was familiar as any one with defendant's business and papers, having his desk in general office of defendant. That Bartlett never owned but five shares of stock in defendant's company, and that he assigned them to William R. Baker and delivered him the certificate therefor in 1861; that Baker, in the same year, presented said assignment to defendant's proper officers, and delivered to them the certificate originally issued to Bartlett, and that the said officers then issued and delivered to him as assignee of Bartlett a certificate for said five shares, which is still outstanding and claimed by him or his assignee; that the certificate which was issued to plaintiff's testator was issued in mistake, in that he, the officer issuing same, did not remember at the time it was issued that one had been issued previously to him, Baker, and if he had known it or thought of it at the time, the one to Van Alstyne would not have been issued.

It was agreed that forty shares of the stock for which judgment was rendered in this case was in lieu of the five shares originally issued to Bartlett.

It was agreed that the issue in this case only extended to the Bartlett stock.

A. S. Richardson testified: I am now secretary of defendant, and as such have in my possession the books and records of Houston and Texas Central Railway Company. The stock-book of said company shows that on the 1st day of April, 1861, a certificate for five shares of the capital stock of defendant was issued to one L. L. Bartlett. (This certificate was then introduced in evidence.) I find among the transfer papers a written transfer from L. L. Bartlett to Wm. A. Van Alstyne, of date 2d March, 1866. (The transfer was then read in evidence.) The stock-books show that on the 27th of March, 1866, defendant issued to W. A. Van Alstyne, by virtue of this transfer, a certificate for said five shares of stock. (The certificate was then read.)

Plaintiff also proved that for the West, Mugg, Anderson and Mayes stock, certificates issued as alleged in plaintiff's petition.

Plaintiff also proved that in the year 1874, defendant, by its board of directors, by resolution, authorized an increase of its stock eight-fold, and provided therein for an exchange and substitution of the original shares for the new certificates, on the basis of eight new certificates or shares of its stock for one of its old or original certificates or shares.

It was admitted that the new stock, at the time of trial, was worth \$52 per share.

A. S. Richardson again testified: As stated before, I am now secretary of defendant. The only stock ever issued to Bartlett was the certificate for five shares, of date April 1, 1861. I find among the records a transfer from L. L. Bartlett to W. R. Baker, of date April, 1861. (The transfer was then read in evidence.) The stock-book shows that by virtue of this transfer a certificate for five shares of stock was issued to said Baker. Baker was the recognized owner of the stock until 1877, when he sold the same to Charles Morgan. (The certificate to Baker for said five shares was then read in evidence.) Van Alstyne was a director in defendant's company from 1856 to the date of his death in 1867.

W. R. Baker testified: I bought the L. L. Bartlett five shares of stock in April, 1861, and he transferred the same to me by written transfer, which I deposited with the defendant at that time—that is, in the office of the secretary—together with the original certificate that had been issued to Bartlett. The certificate to Bartlett was then canceled and a new certificate for said five shares was issued to me; that from 1860 to 1867 W. A. Van Alstyne was a director in defendant's company, and during that time his place of business was in the general office of defendant, where the books and papers of the company were on file. That the transfer of Bartlett to Baker was on file in the office of the secretary at the date of the issuance of the stock to Van Alstyne, and that he (Van

Alstyne) had access to the records of the office, and there was no one more familiar with the records. That I (the witness) was secretary of defendant in 1866, when the certificate for the Bartlett five shares was issued to Van Alstyne, and I issued the certificate at Van Alstyne's request, not remembering that I had previously bought the stock. It was an oversight on my part, and would not have been made if I had remembered that Bartlett had previously transferred the stock. Afterwards I called Van Alstyne's attention to the fact that I had a prior transfer from Bartlett, and he (Van Alstyne) said: "Well, I reckon you have the better title." The witness was secretary of the defendant company at time of issue of Bartlett stock to him, and also at the time certificate of said stock was issued to Van Alstyne, and in issuing said stock was acting within the scope of his authority.

The cause was submitted to the court without a jury. Judgment for the plaintiff, decreeing that plaintiff recover of the defendant the new stock sued for, to be issued to plaintiff within twenty days from date of judgment, and on failure to do so that plaintiff recover the value of said stock as proven on the trial.

The defendant assigned the following as grounds of error:

"The court erred in rendering judgment in favor of the plaintiff for forty shares of defendant's capital stock in place of the five shares originally issued to L. L. Bartlett, because the proof shows that Bartlett assigned this same stock to W. R. Baker in 1861, who presented the certificate of stock issued to Bartlett with Bartlett's assignment to him, when the certificate issued to Bartlett was canceled and a new one issued to Baker in 1861, which he has ever since held; and the proof shows further that afterwards, in 1866, Bartlett assigned the same stock again to plaintiff's testator while he was a director in defendant's company, familiar with its affairs, and that he procured a certificate to be issued to him for the Bartlett five shares, and that this certificate was issued in mistake of the fact that one had previously issued to Baker, and the one to Van Alstyne would not have issued if the board of directors had remembered at the time that one had previously issued to Baker on an older assignment and surrender of the original certificate."

Baker & Botts, for appellant.

E. P. Turner, for appellee.

I. This is not a contest between Van Alstyne and Baker as to the ownership of the Bartlett stock. Hence, if appellant's propositions be true, they are not applicable, nor are the authorities thereunder applicable to the facts of the case. Field on Corp., p. 128, sec. 112; Potter on Corp. p. 333, sec. 260; Bayard v. F. & M. R. R. Co., 52 Penn. St. 232; Halbrook v. New Jersey Zinc Co., 57 N. Y. 621; Kortright v. Commercial Bank of Buffalo, 20 Wend. 91; Isham v. Buckingham, 49 N. Y. 217 and cases cited; McNeil v. Tenth National Bank, 46 N. Y. 325; Pollock v. Na-

tional Bank, 7 N. Y. 278; *Saulsbury Mills v. Townsend*, 109 Mass. 115; *Dallin v. Mid. R. R. Co.*, 22 Eng. L. & E., 452.

II. The allegations of the answer and the proof must correspond.

III. Even if it be regarded as issued under mistake, we submit that where the means of inquiry are equally open to both parties, if a mistake occur without any fraud or falsehood, no relief can be granted. *Kerr on Fraud and Mistake*, pp. 407 (n) and 405; *Daniel v. Mitchell*, 1 Story, 172; *Warner v. Daniels*, 1 Wood & Min. 90; *Hill v. Bush*, 19 Ark. 522; *Jouzin v. Toulmin*, 9 Ala. 662.

IV. This is not a suit for specific performance, and appellant cannot plead mistake as a bar to the action.

V. Should it be considered by the court that there is a suit for specific performance, and mistake would be a bar, the allegations in the answer do not set up mistake, and are utterly insufficient as a bar to this action.

VI. If the certificate was issued to Van Alstyne by mistake on the part of the appellant, and the allegations of mistake in the answer are sufficient, the issuance is clearly due to gross negligence on part of appellant, and is not such a mistake as could be relieved against. *Kerr on Fraud and Mistake*, p. 406; *Bigelow on Estoppel*, p. 552.

WALKER, P. J. COM. APP.—The character of this suit is to enforce a specific performance of a contract made under a mistake of fact as to the essential elements and considerations which entered into it. The proper determination of the issue between the parties rests upon the inquiry whether the transaction between Van Alstyne and the proper officers, representing the defendant, which resulted in issuing to him, as the assignee of Bartlett, a certificate of five shares of stock, was in law or equity one which constituted him a bona fide stockholder; one entitled to receive dividends with other stockholders of the corporation; a stockholder entitled to demand and have the benefit of the resolution of the directors of the defendant, entitling each of its stockholders to eight shares of new stock in its company for each share previously issued.

Van Alstyne, when he applied for and obtained the certificate on which he relies in this suit for five shares of stock, does not pretend to acquire or hold the same as the assignee of any certificate for stock hitherto issued to Bartlett; but whatever rights he pretended to claim under Bartlett were asserted to exist under an assignment of said Bartlett's stock.

Bartlett's certificate of stock had long before the said assignment ceased to exist. It had been delivered to Baker as the assignee thereof, and by Baker surrendered to the defendant, receiving in lieu thereof certificates for the five shares of stock, which transaction was properly evidenced by the books of the corporation, through

appropriate entries made thereof. Van Alstyne therefore took no legal title whatever to any interest or right of Bartlett to said five shares of stock, so far as any transfer from Bartlett to Van Alstyne was concerned, after the transactions which have been recited under his transfer to Baker transpired, culminating in the utter extinction of Bartlett's certificate, and of all right of Bartlett, legal and equitable, as shown by the surrender of stock referred to, and its replacement by an original and independent certificate issued to Baker instead. It was the same, when Bartlett made his assignment to Van Alstyne, as though he had never been in any wise connected with said five shares of stock.

Clearly, Van Alstyne acquiring no legal title under Bartlett's assignment to him, his right, or rather the right of his heirs or estate, to enforce the rights claimed in this suit against the defendant must depend upon such equities, as against the defendant, as can be shown to exist under the facts of this case.

The rules of law or equity applicable to this case are not complicated with questions as to the relative rights of Baker and of Van Alstyne under their respective assignments, nor with any question as to what might be the rights of a third person who had purchased from Van Alstyne, without notice as to the facts, bona fide, and for a valuable consideration. The case which is before us presents the question whether, as between the original parties to the assignment made to Van Alstyne, he is entitled to enforce specifically the contract which entitled him, *prima facie*, on the face of the certificate which was issued to him, to the benefits pertaining thereto.

No ground of equitable relief, in behalf of the plaintiff, seems to be relied upon by either allegation in the plaintiff's pleadings, nor does the same appear in the statement of facts, nor by the case agreed upon. It is not pretended by the plaintiff that Van Alstyne procured the assignment upon which he relies, under inducements or representations held out or made to him by the defendant or its officers; nor is it alleged that he was ignorant in fact of the status of Bartlett's right at the time of his procurement of the assignment from him (Bartlett); nor is there any charge of any concealment or suppression of evidence as to the condition of the Bartlett stock, or the certificate therefor; nor is it alleged that Van Alstyne was ignorant of any of these material facts, or that he made inquiries concerning the same, or that he would have been unable to ascertain the facts by duly making inquiry concerning them. It is not alleged, nor shown by proof, that Van Alstyne was a purchaser of Bartlett's right to five shares of stock, for a valuable consideration, in good faith and without notice. And on the other hand, Van Alstyne is shown by the evidence to have occupied a position of trust towards the defendant—being one of the directors of defendant—which relation charged him with the duty of advising himself

concerning the interest and affairs of the stockholders of said railroad company; and the evidence disclosed the fact that he was expert, and well informed concerning the stock-books and stock transactions relating to the defendant. "When the means of inquiry are equally open to both parties, if a mistake occur without any fraud or falsehood, no relief can be granted on account of the mistake alone." *Daniel v. Mitchell*, 1 Story, 172; *Warner v. Daniel*, 1 Wood & Min. 90; *Hill v. Bush*, 19 Ark. 522; *Jouzin v. Toulmin*, 9 Ala. 662. Equity will not favor and aid a party thus situated, in his acts of negligence or carelessness, where he seeks to make either available as the basis whereby to obtain and assert an interest adverse to that of his cestui que trust. His relation bound him to care and vigilance in behalf of the defendant and the interest of the stockholders, if he went into the market as a dealer in its securities; and he was bound besides to the utmost good faith towards the corporation whose interest he represented. Van Alstyne is shown to have occupied a position and a relation to the facts, as well as to all the parties concerned, as to preclude him from asserting a right to be protected against a mistake in which he was to profit so largely. "Though a court of equity will relieve against mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may be fairly expected from a reasonable person." *Kerr on Fraud and Mistake*, p. 407 and note and authorities cited.

The brief of counsel for appellee disclaims that this is a suit for specific performance; but it certainly seems to be nothing less than an effort by the plaintiff, in effect, to enforce specifically the obligation which, it is alleged, arose and exists under and by virtue of the evidence, which the certificate for stock issued to Van Alstyne, to require the issuance of additional certificates in the ratio of eight for one to said Van Alstyne, and in default thereof to compensate the plaintiff in damages to the amount of the value of all such evidences of plaintiff's rights to dividends.

As the plaintiff's case is not rested upon equities which might entitle her to a specific performance, the discussion and application of principles of law applicable to such remedy is wholly superfluous. Evidently the rules applicable to relief upon equitable grounds find nothing in the facts of this case suggestive of their application.

The mistake of fact which is so clearly admitted by the parties possesses a twofold force; in equity it constitutes a full answer to the plaintiff's case in respect to her alternative claim for damages in case specific enforcement of the contract be denied to her by the court; and, as we have endeavored in this opinion to show, the alleged mistake is not connected with any equity which the plaintiff's testator could assert.

The plaintiff's case is made to depend upon the intrinsic value of

a certificate for stock issued under a clear mistake of fact on the solicitation of the plaintiff's testator, who was a director of the corporation, the stock of which he was endeavoring to acquire; whose interest he was charged by his official duty to protect; and the plaintiff failing to show any fraud used to his disadvantage, or any mistake which he might not have guarded against, and failing to show besides either ignorance in fact, surprise, or that he was a bona fide purchaser for a valuable consideration without notice, we perceive no reason, and acting on principles and maxims of law the most elementary, to hesitate to say that the judgment rendered for the plaintiff below was erroneous, and that the evidence in the case warranted a judgment for the defendant.

Wherefore we conclude that the proper disposition of this appeal is that the judgment below be reversed and the cause remanded for further proceedings.

Reversed and remanded.

MATTHEWS

v.

MURCHISON ET AL.

(*Advance Case, U. S. Circuit Court, Eastern District, N. C.*)

One of the largest bondholders in a railroad company, *Held*, under the circumstances of the case, to be bound by a plan for the reorganization of the company after a foreclosure sale.

Said bondholder having received without objection her proportion of bonds in the new company and offered part or the whole of them for sale, *Held*, that she was estopped from denying the valid and binding nature of the agreement for reorganization.

The state alone can set up and take advantage of the incapacity of a corporation under its charter to purchase and hold the stock of another corporation.

A bondholder in a corporation cannot obtain an injunction to restrain the directors thereof from sacrificing its interests to another corporation, where the company is solvent and abundantly capable of responding in damages to the complainant.

BOND, C. J.

This is a bill filed to dissolve and declare void the organization of the Carolina Central Railway Company, and to reorganize it and establish it under a new plan alleged to have been the only one to which the plaintiff, who is a large bondholder of a former organization, ever agreed, and for injunction and the appointment of a receiver meantime.

The case is not submitted on its merits, but upon this preliminary motion.

The evidence is very full and the record a very large one. The motion has been thoroughly argued, and ably prepared briefs submitted and the court has given them patient study.

The facts, so far as it is necessary to recite them for the present purpose, are these:

The complainant was the owner of eleven hundred and ninety-four bonds each for the sum of one thousand dollars secured by a first mortgage on the Carolina Central Railway Company, all its properties and franchises, and she likewise held second mortgage bonds issued by that company to the amount of \$2,550,000. The company made default in the payment of the interest upon its bonded debt and an action was brought in the Superior Court of New Hanover County, North Carolina, to foreclose the mortgage and sell the property, which that court decreed should be done, and the sale was made accordingly on the 31st day of May, 1880. There is no question about the regularity of these proceedings. At the sale Francis O. French, Arthur B. Graves, David R. Murchison, James S. Whedbee and Andrew V. Stout, a committee appointed by the first mortgage bondholders, became the purchasers. The court directed the commissioners who made the sale to make a deed to these purchasers, who were to be a corporation by such name as they might see fit to adopt in conformity to the laws of North Carolina. The old corporation was dissolved and a new one formed under the corporate name "Carolina Central Railway Company," to which all the property and franchises of the old corporation were conveyed free and discharged from all former liens and encumbrances.

Prior to this sale there had been consultation among the bondholders respecting the sale and purchase of the road and the plan of reorganization to be followed when the purchase was made. It is in respect to these plans that the complainant makes complaint.

In our opinion Col. Matthews, the husband of Virginia B. Matthews, was, as appears from the whole case, if not the real owner of these securities, the complainant plenary attorney, and the case must be treated as if he were the plaintiff or as if all his acts and declarations were those of his wife.

Before the 12th of May, 1880, during the pendency of the foreclosure suits several plans of reorganization had been agreed upon between Graves and Matthews. Two, at least. These both gave an undue advantage to the old second mortgage bonds, that is, to Matthews; and it is to be presumed that it was impossible to get the consent of the first mortgage bondholders to them. At any rate, they were abandoned and complainant signed a paper authorizing Francis O. French, a party defendant hereto, to designate a plan, and making him substantially arbitrator as to the question between

the old second and first mortgage bondholders. This was on the 15th May, 1880. On or before December 12th, 1879, Mrs. Matthews had owned \$1,690,000 of the old first mortgage bonds. On that day she sold \$500,000 of them to R. A. Lancaster & Co., hypothecated \$500,000 more on a loan from French, Stout and Graves and gave the last-named persons a power of attorney for five years to vote on \$1,000,000 of her bonds, including the \$500,000 hypothecated ones. The power of attorney was given on the condition that the attorneys should consent to and approve the plan of reorganization of the company in accordance with the plan annexed. This plan was modified by plaintiff on the 27th of February and abrogated on the 15th of May, 1880, French being authorized to designate a new plan as above stated. Before this, however, on the 12th of May, 1880, more than five sixths of the old bondholders had entered into an agreement looking to the purchase of the C. C. Railroad at the foreclosure sale. This paper was signed by complainant among others, and was binding upon all who signed it, and the court, as far as the nature of the case permitted; would enforce it. The purchase was made under this instrument, and no organization, not effected in accordance with its terms, would have had the consent of the parties in interest while it remained in force. It provided among other things that French, Muschison, Graves and Whedbee with power to add a fifth to their number should be a committee to purchase at the foreclosure sale, and in case they did they were to prepare and submit to the subscribers a plan for the reorganization of the company, which plan should be binding when approved by two thirds in amount of the bonds. This was signed by Mrs. Matthews on the 12th of May and three days afterward she signed the agreement that French might designate a new plan. These two papers were of course in the mind of Mrs. Matthews, or rather of her husband, at the same time, and it is impossible to doubt she meant that the plan was to follow the course of the former and be submitted by the committee to and be approved by the requisite number of first mortgage bonds. This could not be done till after the purchase of the road. It is true that before that time French did draft a plan and the requisite number of bondholders signed an authorization to the committee to carry it out. The plan, however, was never presented by the committee and was never carried out. We are now asked to enforce it. It is plain we ought not to do so. It is not within the terms of the instrument of May 12th, 1880. French had not exhausted his power under the instrument making him arbitrator, and when he subsequently presented the plan marked "Y" he was acting under that authority. This plan differed from plan "C" in but two points. It added to the definition of the word "income" the words "all questions of expenditure within the discretion of the Board of Directors" and it changed the attachment

of the stock and its amount. Neither of these changes is material. The discretion mentioned is of course a legal discretion and the board would have had that without giving it in express words, and the change in the attachment of the stock from one set of bonds to the other is of no importance to complainant, as she got the same share under one agreement or plan as she would have done under the other. The company has been organized, its new bonds and stock issued and sold. The complainant has received her proportion of bonds in the new organization without objection and has offered to sell the whole or part of it; yet, if the complaint she now makes be true, she knew the company illegally organized and had no power to issue either bonds or stock. French acted within the scope of his power of attorney. The plan "F" which he voted for in the presence of his associates, Graves and Stout, was sent to Matthews, who was then in Europe, as is evident from Matthews' letter to Robinson of 16th September; and even if French had exceeded his power of voting for Matthews, he professed to act under it, and complainant and her husband knew it, and their conduct after such knowledge ratified her act. The complainant received the new bonds; she attempted to buy more and offered to sue them and brought suit for some she claimed to be hers. All these things were done after the knowledge of French's act.

To come into a Court of Equity and ask it to set aside the organization of the new company under these circumstances, and to take its property out of its hands and put it into those of a receiver is little else than monstrous. Every act of complainant and her husband after the vote of French led the public and the committee of purchase and organization to suppose they acquiesced.

The law and good conscience required that if they disapproved French's conduct and denied his power to act as he had done, then to say so at once and not mislead everybody by dealing in the worthless securities which they secretly meant to repudiate.

Whether this is an estopped or a ratification is of little consequence; not to regard it as one or the other would work the greatest injustice to the other bondholders. We think this decides the matter and is fatal to complainant's claim for a receiver now or at any other time under her bill of complaint.

The bill charges that the Seaboard and Roanoke and Raleigh and Gaston Railroad have no right to own shares in the reorganized Carolina Central Railway Company. This is of no importance to complainant. If the company had no right to purchase shares then those they sold belong to Murchison's estate, from whom they bought them, and if they could purchase and not hold them and are exceeding their corporate powers, the State of North Carolina is the party offended.

The bill charges that the parties holding the control of the company intend to sacrifice its interest to that of the Raliegh and Gaston and Seaboard Roads, but there is no proof whatever of the fact; and even if the complainant had more equity on the merits there is no irreparable injury threatened and the road is solvent and abundantly capable of responding in damages to the complainant.

The motion for injunction and receiver is denied. We have not copied in this opinion the paper referred to in it. It would be useless to do so for the sake of the counsel, who are familiar with the record, and to do so for the benefit of the profession would make the paper as large as the record and profession would never see for it would never find a printer.

The right of purchasers at a foreclosure sale to reorganize and form a new corporation is especially provided for by statute both in England and in this country. The existing legislation on the point in England is comprised in Stat. 30 & 31 Vict. C. 127, §§ 6-16. See the following decisions under this act.

London Financial Ass'n v. Wrexham & C. Ry. Co., L. R. 18 Eq. 566; Bristol v. North Somerset R. Co., L. R. 6 Eq. 448; In Re Devon v. Somerset Ry. Co., L. R. 6 Eq. 610; In Re Cambrian Ry. Co's Scheme, L. R. 3 Ch. 278; Munns v. Isle of Wight Ry. Co., L. R. 8 Eq. 658; Stevens v. Mid. Hants R. Co., L. R. 8 Ch. 1064.

In this country the subject is provided for by the statutes of the various states, of which a full account is given in Jones on Railroad Securities, § 661 et seq.

James v. Cowing, 82 N. Y. 449; Thornton v. Wabash R. Co., 81 N. Y. 462; Jesup v. Wilmington & Manchester R. Co., 2 S. C. 469; Witherspoon & Lane v. Texas, Pacific R. R. Co., 48 Tex. 809; Miller v. Rutland etc. R. Co., 40 Vt. 899; St John v. Erie R. Co., 22 Wall. 186; Wetmore v. St. Paul & Pacific R. Co., 5 Dill. C. Ct. 581; Sage v. Central R. R. Co., 99 U. S. 334; Morgan Co. v. Allen, 103 U. S. 498.

THE RICHMOND STREET RY. CO.

v.

REED.

(*Advances Case, Indiana. October 4, 1882.*)

It is a settled rule that the decision of an appellate court upon any question or questions actually in judgment and properly before it for decision, is binding in all the subsequent stages of the cause. This rule does not, however, apply to matters stated by the appellate court merely by way of illustration or argument.

Where suit is brought to recover a subscription to a railroad company, made before the organization of the company, it is necessary to a recovery that the complaint should show that the steps essential to bring the corporation into existence were duly taken.

In such case it is also necessary under the provisions of the Rev. Stat. of

the State of Indiana, § 4143, to show that the contract of subscription contained *inter alia* a specification of the number of the directors of the proposed corporation.

Where one subscribes a paper which in express terms professes to constitute articles of association, and contains provisions showing that to be the character its subscribers intend it to bear, it cannot afterwards, without the consent of the subscribers, be transformed into a mere preliminary agreement.

Where such articles contain a clause providing that when the full amount of the capital stock is subscribed any two of the subscribers may call a meeting for the purpose of effecting an organization and incorporation, and for electing directors, at which meeting any three or more subscribers may proceed to organize, as aforesaid, this will not be construed to constitute a delegation of authority by any subscriber to increase the capital stock, increase his own liability, or in any other way to change the effect and character of the original contract of subscription.

APPEAL from the Circuit Court of Wayne county.
Chas. H. Burchenal, for appellant.

ELLIOTT, J.—This case is in this court for the second time. The appellee prosecuted the first appeal and obtained a judgment reversing that of the Circuit Court, and instructing it to sustain the demurrer to the complaints. *Reed v. The Richmond, etc., Co.*, 50 Ind. 34. It is important to determine at the outset what questions were before and decided by the court upon the former appeal. It is a settled rule that the decision of the appellate court upon the question or questions in judgment is conclusive upon such questions throughout all the subsequent stages of the case. What is stated by way of illustration or argument does not, of course, profess any such force, but the decision upon the questions properly before the court does have this effect. It was decided in this case, that the subscription sued on having been made before the organization of the corporation, it was necessary to a recovery that the complaint should show that the steps essential to bring the corporation into existence were duly taken. This ruling, we may remark in passing, is in accordance with the settled doctrine of this State. It was also decided that the complaint as it then stood was bad, because it did not show a compliance with the statute in that it was not made to appear that the appellee, Reed, in any way assented to the number of names of the directors. The court, in the course of the opinion, enumerated the requirements of the statute, and said: "The appellant never, in any way, assented to the number of names of the directors, for they were not stated in the articles signed by him, and he was not at the meeting when the number of the directors was designated, and they were elected." After the case reached the court below, in obedience to the judgment remanding it, the appellant amended its complaint, and the question which we first encounter is, "Does the amendment to the first paragraph of the complaint take it out of the rule established by the judgment of this court upon the

former appeal?" The learned counsel for the appellant thus describes the amendment: "But since that ruling was made [i.e., the ruling of this court on the former appeal] the complaint has been amended, and now comes here with the additional averment, that at the same meeting when the articles were adopted and the directors elected, the subscribers, by an express resolution, fixed the number of directors at seven." We cannot regard this amendment as freeing this paragraph of the complaint from the fault adjudged to exist by this court. The pleading is in all substantial respects the same as that pronounced bad, and we cannot, even if so disposed, change that judgment. The amendment does not show that the appellee assented, either directly or indirectly, to the designation of the number of directors, or that he acquiesced in their election. If we did not feel bound to regard the judgment upon the former appeal as conclusive, and felt ourselves at liberty to decide the question as an open one, we should decide it adversely to the appellant. The statute provides that the articles of association shall contain four distinct and substantive statements, and courts have no power to declare that any one of these may be omitted. If they have the power to declare this as to one, they must necessarily have that power as to more than one, and this would leave the decision of the sufficiency of such instruments to be determined by another and different standard than that prescribed by the legislature. It would lead to uncertainty and confusion to depart from the plain language of the statute, while to hold to it will secure certainty, and impose hardships upon no one, for the language of the statute is plain and unambiguous, and its requirements easily complied with. R. S. § 4143.

The second paragraph of the complaint alleges that the appellee, with other persons, subscribed articles of association, with the view to the organization of a corporation for the purpose of constructing and operating a street railway; that said articles provided for a capital stock of not less than \$10,000, nor more than \$100,000, to be divided into shares of \$2500 each; that the articles contained an agreement to take and pay for the shares of stock set opposite the names of the respective subscribers; that after more than five persons had subscribed such articles, and stock to the amount of \$10,000 had been subscribed, twelve of the subscribers held a meeting for the purpose of organizing and electing directors; that notice of the time and place of the meeting had been previously duly given; that at such meeting the subscribers elected seven directors, and severally subscribed articles of association setting forth the names of the directors, the amount of capital stock, the number of shares of such stock, and the purpose of the corporation. The instrument subscribed by the appellee is set forth, but not that alleged to have been adopted and subscribed at the meeting of the twelve subscribers. The paper subscribed by the appellee was

not sufficient to constitute the subscribers a corporation. One reason for declaring it insufficient is that the number and names of the directors are not stated. We are satisfied, as already declared, that the requirements of the statute must be complied with in the execution of articles of association. *Reed v. Richmond & Co.*, supra; *Dutchess & Co. v. Mabbett*, 58 N. Y. 397; *Ponghkeepsie, etc., Co.*, 24 N. Y. 150.

As we find one valid reason for holding the instrument insufficient, we need not examine the other objections stated by counsel. It is contended by appellant that the complaint shows two different articles of association, and that the one set out as an exhibit is a mere preliminary paper, while that executed at the meeting of the twelve subscribers is the final and complete one. We think this position cannot be maintained. The paper in terms declares its character, and the provisions written in the body clearly and unmistakably show that it was intended and understood by the signers to be a complete and final instrument of incorporation. Where one subscribes a paper which in direct terms professes to constitute articles of association, and contains provisions showing that to be the character its subscribers intend it to bear, it cannot afterwards, without the assent of the subscribers, be transformed into a mere preliminary agreement. A paper which at the time of its execution means one thing, cannot, without the consent of its signers, be afterwards made to mean something different. A further contention of appellant's counsel is, that the clause contained in the instrument reading as follows: "Article 4. When the full amount of said capital stock of \$10,000 or more has been subscribed, it shall be lawful for any two of said subscribers to give notice in writing, through the post-office, to all said subscribers of the time and place of meeting, for the purpose of effecting an organization, and incorporating under the laws of Indiana, and electing directors; and after such notice, any three or more of such subscribers may meet at such time and place, and proceed to have said company duly organized and incorporated as herein provided." Conceding, without deciding, that this was a delegation of authority by the appellee to his associate subscribers, it is by no means so broad as that claimed by counsel. It is no authority to execute new articles of association. The authority to incorporate means plainly enough the authority to make the articles of association effective by filing as the law requires. The incorporation was not complete until this was done. There is nothing in the language used indicative of an intention to vest in others the authority to execute new and different articles of association, and the situation and surroundings of the parties forbids such a construction of the language used. It is not reasonable to presume that a party having subscribed articles of association, professing in terms to be such, and containing provisions indicating a complete

instrument of that character, meant to confer authority upon his associates to change them at their pleasure. To hold this would be to declare that the appellee clothed his associates with authority to increase the capital stock at their pleasure, to increase his own liability, and, in short, in any and every way, except only the object of the association, change the effect and character of the instrument he had signed. The reasonable construction of the clause quoted is that it invested three or more subscribers with power to perfect the corporate organization, not to tear up its foundation and build a new one. The provision in the clause relied on by appellant, "and proceed to have said company duly organized and incorporated as herein provided," shows that the articles then executed, and not different one, were to be the basis of the corporation. The restriction forbids the conclusion that the subscribers meant to clothe three of their number with power to make new articles. It is a familiar rule of construction that a contract shall, if it can be reasonably done, be so construed as to give effect to every clause, and that none be deemed meaningless, and this rule applied here would require full force to be given to the clause quoted.

Not only does this rule require the construction we adopt, but the context plainly indicates the intention of the parties to give the clause full force and effect.

Judgment affirmed.

Where a corporation is not actually in existence subscriptions to its capital stock cannot be enforced.

Mt. Sterling Coal Road Co. v. Little, 14 Bush, 429; *Thrasher v. Pike County R. Co.*, 25 Ill. 398; *Strasburg R. Co. v. Echtemacht*, 21 Post, 220; *Monterey & S. V. R. Co. v. Hildreth*, 53 Cal. 128.

Incorporation is a necessary condition precedent to an enforcement of such subscriptions.

Stoops v. Greenburgh & B. Plank Road Co., 10 Ind. 47; *Oregon Central R. Co. v. Scoggin*, 3 Oreg. 161; *Low v. Connecticut & P. R. Co.*, 45 N. H. 370; *Marlborough Branch R. Co. v. Arnold*, 9 Gray, 159; *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 180; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 485; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 386; *Doris v. Sweeney*, 60 N. Y. 648; *Tonica & P. R. Co. v. McNeeley*, 21 Ill. 71; *Midland Gt. W. R. Co. v. Gordon*, 16 M. & W. 804; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 18 N. Y. 451; *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157; *Garrett v. Dulsburg & M. R. Co.*, 78 Pa. St. 465.

For the authorities relative to a release of stockholders from liability, in consequence of a subsequent change in the design of the corporation, etc., etc., see note to 4 Am. & Eng. R. R. Cas. 261.

ADDISON ET ALS. v. LEWIS ET ALS.

BLYTHE ET ALS. v. LEWIS ET ALS.

(75 *Virginia Reports*, 701. *September Term*, 1881.)

A mortgage of the road, and of the present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, is, while it retains possession, a prior lien upon the net earnings of the road.

The funds in the hands of a receiver of a railroad, appointed in a suit to foreclose a mortgage executed by the company, must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors.

These rules are subject to this modification, however: the net earnings, while the road is in the possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders.

These claims are confined to outstanding debts for labor, supplies, equipments or permanent improvements of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable.

When a Court of Chancery is asked by railroad mortgagees to appoint a receiver, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of issuing the necessary order, impose such terms, in reference to the payment from the income, during the receivership, of outstanding debts from labor, supplies, equipments or permanent improvements of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of cause, if required in the due administration of justice and the enforcement of the equities of the respective parties.

When the current earnings of a railroad, which ought, in equity, to have been employed to pay current debts contracted before the receiver's appointment, for labor, supplies and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has been thus improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands, before anything derived from that source goes to the mortgage creditors.

This doctrine of restoration of the funds rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are, in a sense, trustees of these earnings for the benefit of the different claims of creditors, and if they give to one class of creditors that which properly belonged to another, the court may, upon an adjustment of accounts, so use the income in its hands as to restore, if practicable, the parties to their original rights.

The claims of the general creditors can never take priority over the mortgage creditors, except when it is shown that such general creditor has, upon the principles of Courts of Equity, a superior equity to the lien creditor. No general rule can be laid down on the subject, but each claim must be determined upon the particular facts showing the peculiar equity.

The directors of a corporation are its officers or agents, and represent the interests of that abstract legal entity and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to

make contracts, and these contracts may be made with the stockholders as well as with others.

When the lender of money to a corporation is a director charged along with others with the control and management of the corporation, representing in this regard the aggregated interests of all the stockholders, his obligation, when he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him; but the general doctrine with regard to this class of contracts is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it.

These are cases of appeal from the decree of the circuit court of the city of Richmond, rendered on the 23d day of April, 1880, in a suit in equity brought by Henry Lewis and Henry S. McComb, who sued for themselves and all other lien creditors of the Washington and Ohio R. R. Co., a corporation of the State of Virginia, against the said corporation and others, to enforce against the defendant corporation certain claims of the complainants secured by a mortgage or deed of trust executed on the 1st day of May, 1868, by the Alexandria, Loudoun and Hampshire R. R. Co. (the name of which company was, under the authority of a statute passed March 20, 1870, changed to the Washington and Ohio R. R. Co.) on its road, franchises, etc.; and averring the insolvency of the corporation, the bill prayed for the appointment of a receiver, the bill prayed for the appointment of a receiver, the ascertainment of the liens upon its property, and their respective priorities, and a sale of the road of the corporation, its franchises, etc., to satisfy the liens and other debts due by the corporation.

A cross bill was filed in the cause by A. E. Addison and others, claiming to be the holders of bonds issued by the Washington and Ohio R. R. Co., and secured by a deed of trust dated the 1st day of April, 1871. And petitions were filed by intervenors Michael Gillen, Lewis McKenzie, James H. Read, receiver of the Farmers' and Mechanics' Savings Bank of Alexandria, and Adams, Hamner & Co., respectively. Appeals were allowed in said several cases, from said decree, by one of the judges of this court.

The said cases were argued at Richmond, but decided at Staunton.

The facts of the several cases, so far as it is necessary to state them in order to understand the points decided, are sufficiently stated in the opinion of Christian, J.

Claughton & Stuart in first case, and John A. Meredith and R. H. Lee in second case, for appellants.

John A. Meredith, R. T. Barton, Wm. J. Robertson, R. H. Lee, Wise & Hobson, and Thos. F. Bayard in first case, and said Barton, Bayard, and Robertson in second case, for appellees.

CHRISTIAN, J.—These causes were heard together, and may all be disposed of in one opinion.

The original bill was filed by Henry Lewis, of the city of Philadelphia, and Henry S. McComb, of the State of Delaware, who sued for themselves and all other lien creditors of the Washington and Ohio R. R. Co.

The bill alleges the insolvency of the company, and sets forth with much particularity the claims of the complainants, secured by a mortgage or deed of trust executed by said company on the 1st of May, 1868, to secure the said Henry Lewis, who is the holder of bonds to the amount of \$37,500, and the said Henry S. McComb, who is the holder of bonds to the amount of \$150,000.

After giving a minute history of the manner in which these claims originated, and after reference to other supposed liens created by the company, and after giving in detail the condition, property, franchises and assets of the company, the bill asks for a foreclosure of their mortgage and the appointment of a receiver.

In their prayer for relief, the complainants ask :

1. "That said mortgage or deed of trust may be decreed to be a lien upon all and every part of the railroad of the said corporation and its appurtenances in the said mortgage or deed of trust mentioned, whether constructed before or since the date of the same, and upon all its property of every description, real or personal, then held or thereafter acquired, together with the said corporation's franchises, and all and singular its rights, powers and privileges in regard to said railroad and property.

2. "That it may be decreed that the entire net revenue or income of said railroad is, as the same shall accrue, subject to said mortgage or deed of trust, and that after deducting therefrom the necessary expenses of maintaining and operating said railroad and such charges, if any there be, which at law or in equity may have a priority over the bonds secured by said mortgage or deed of trust, any such net income may be decreed to be applied to the payment of the arrears of interest on the said bonds.

3. "That the amount due upon said bonds, principal and interest, intended to be secured by the said mortgage, the amounts due under each other mortgage executed by the corporation defendant, whether under its former or present corporate name, the sums of money due by judgment or other lien against said corporation, and the parties entitled to be paid said bonds and judgments, or other debts, be speedily ascertained and determined. And forasmuch as the parties holding, or entitled to hold said bonds and the creditors to whom said judgments or other liens may be payable are very numerous, the complainants pray that the matter of this investigation be referred to one of the master commissioners in chancery of your honorable court, who, by proper publication, shall convene all parties interested before him, and by record or other evidence shall ascertain said matters, and return his report thereof to your honorable court.

4. "That a decree may be entered directing the defendant, the Washington and Ohio R. R. Co., to pay to the complainants what shall, upon taking such account, appear to be due to them upon the said mortgage or deed of trust, as hereinbefore mentioned, by a short day to be named by the court.

5. "That in default of such payment it be decreed that the Washington and Ohio R. R. Co. and all persons claiming under them, by any lien or incumbrance subsequent to said mortgage or deed of trust of May 1st, 1868, be absolutely barred and foreclosed of and from all right and equity of redemption in and to the said premises, and that a decree of this court be made that the defendants Henry D. Cooke and Moses Kelly, trustees under said mortgage or deed of trust, do proceed to sell the same in execution of the trusts of said deeds and pursuant to such directions as this court may make in the premises, in such manner that the purchaser or purchasers thereof shall take a title to the same, subject to such valid liens or encumbrances thereon as may be prior in legal effect to the said mortgage or deed of trust, and that the proceeds of such sale may be applied as in said mortgage or deed of trust, is in that behalf specially directed.

"And further, that at any such sale the purchaser or purchasers of the said mortgaged premises may be permitted to pay the purchase money by the surrender of such bonds of the said company as he or they may hold according to their due order of priority and with the amount of the purchase money.

6. "That until such sale, a receiver be appointed to take charge of and administer the property conveyed by said mortgage or deed of trust, under the direction and subject to the order of this court, with the usual powers, and that until such appointment be made the president, directors and other officers of said corporation be restrained by the order of this court from further issuing any bonds of said corporation, and from in any manner transferring or disposing of any of the property or assets of said corporation, or the capital stock held by the corporation, or from using or applying the funds of corporation to the payment of any debts of the corporation, or to any purpose other than the necessary expenses of running the railroad, until a receiver appointed by the court shall take charge of the same."

The bill was answered by the Washington and Ohio Railroad Company, and a cross-bill was filed in the cause by the appellants Addison and others, under which various accounts were ordered, numerous depositions taken, and a decree entered declaring the different liens created and outstanding against the Alexandria, Loudonn and Hampshire Railroad Company, and the Washington and Ohio Railroad Company and their priorities; and further decreeing that unless the Washington and Ohio Railroad Company, or some one for it, shall within sixty days from the date of such

decree pay off and satisfy the several debts therein adjudged to be due, then certain special commissioners appointed for the purpose, after due notice in newspapers published in certain cities therein named, shall sell at public auction, at the railroad depot of the Washington and Ohio Railroad Company, in the city of Alexandria, the entire line of said railway constructed in whole or in part, and all the works and property, real, personal, and mixed, and all rights, contracts, and franchises of said Washington and Ohio Railroad Company as described in the several deeds of trust filed in the record.

From this decree Addison and others, and Blythe and others applied for and obtained an appeal from one of the judges of this court.

The two appeals raise substantially the same questions, and will hereafter be considered together.

Before, however, considering the interesting questions raised by these appeals, we will first dispose of the cases in which petitions were filed by interveners who came into the cause after the appointment of a receiver by the circuit court.

The first to be noticed is the petition filed by Michael Gillen. He asked to be admitted a party defendant to the suit, with leave to file an answer and cross-bill in behalf of himself and the Alexandria, Loudoun and Hampshire Railroad Company. He claims to be holder of ten shares of stock in said company. The petition sets out many grounds of complaint against the president and directors of said company, and charges fraud and irregularity in the proceedings which resulted in the change of name of the company to that of the Washington and Ohio Railroad Company, and claims that those proceedings were null and void.

Without setting forth in detail the grounds of his petition, I think it is sufficient to say that the petition was properly rejected by the circuit court, for the reasons given by the judge of that court in his able and elaborate opinion filed with the record. After a careful examination of the authorities to which he refers, and consideration of the grounds upon which he places the rejection of the petition, I cannot do better than to adopt the views which he expresses.

"The petition must be rejected.—

"1st. The lapse of time is alone sufficient to forbid the entertainment of any contention as to the original organization of the Washington and Ohio Railroad Company. Nearly ten years have elapsed since the stockholders of the Alexandria, Loudoun and Hampshire Railroad Company, in general meeting assembled in the city of Alexandria, July 26, 1870, adopted and assented to the provisions of an act of the general assembly of Virginia, authorizing the change of the corporate name. Since then it has been notoriously and conspicuously claiming and exercising all the cor-

porate rights and franchises originally conferred upon the Alexandria, Loudoun and Hampshire Railroad Company, and has been recognized by the State of Virginia in all of its departments, as the successor, or alter ego, of the original company, and as such has contracted debts to the extent of hundreds of thousands of dollars. *Twin-Lick Oil Company v. Marbury*, 1 Otto, 592.

"2d. The rights of the petitioner and of all other stockholders of the old Alexandria, Loudoun and Hampshire Railroad Company, have been under the protection of the Washington and Ohio Railroad Company, as a party to the suit, represented by learned and competent counsel.

"3d. The petitioner has no real interest in this suit. The company is hopelessly and inextricably insolvent. In no possible contingency can all of its property be made to realize enough to pay its creditors, and of course no stockholder, as such, has any interest in the result of this cause.

"4th. If the petitioner had any real interest, it would be grossly unjust to the other parties in interest to delay the proceedings to allow him an opportunity at this late stage of this case to litigate his rights. If the property of the company should only realize at sale the sum of \$200,000, some of its creditors are suffering by delay in the mere increase of interest to the extent of \$1000 per month, the exact amount of the original par value of petitioner's stock. He holds only 10 out of 18,000 shares, and is the only complainant against all the other acquiescing shareholders, and if he were permitted to delay the proceedings it would be only equitable to require him to execute bond to indemnify the other parties against the damages consequent upon the filing of his answer and cross-bill, and it can scarcely be supposed that he would accept the privilege at the price of incurring an obligation for every thirty days of delay of the full original value of his stock."

The appeals of the other intervening petitioners, Lewis McKenzie, James H. Read, receiver, and Adams, Hamner & Co., will next be considered.

The same principles of law are applicable to each case. In each case it is sought to bring the claims of the interveners within the operations of the principles declared by the Supreme Court of the United States in the cases of *Fosdick v. Schall*, and *Hale v. Frost*, 9 Otto, pp. 235, 389, and the decisions of this court in the cases of *Williamson's Adm'r v. Washington City, Virginia Midland and Great Southern Railroad Company*, and the *Abbott Iron Company v. Same*, 33 Gratt. 624. I do not think that these cases can be brought within the principles of these decisions. To allow them would be to stretch the principles declared by the Supreme Court of the United States, and by this court, far beyond their legitimate scope. Indeed, it has been said, and said truly, that these decisions constitute "a new departure," and I am not disposed to ex-

tend the doctrine one inch beyond the point to which the authority of these cases plainly points.

The principles declared by the decisions of the Supreme Court of the United States were examined and approved by this court in the elaborate opinion of Judge Staples in the cases above referred to (see 33d Gratt. 624), and may be stated as follows:

1st. Mortgage of the road, and present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, are, while it retains possession, a prior lien upon the net earnings of the road. *Hale v. Frost*, 9 Otto, 389.

2d. The funds in the hands of a receiver of a railroad appointed in a suit to foreclose a mortgage executed by the company must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors. *Huidekoper v. Locomotive Works*, 9 Otto, 258.

3d. These rules are subject to this modification, however. The net earnings, while the road is in the possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. *Hale v. Frost*, and *Fosdick v. Schall*, supra.

4th. These claims are confined to outstanding debts for labor, supplies, equipments, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. *Fosdick v. Schall*, supra.

In the last named case Chief Justice Waite says: "Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests."

When a court of chancery is asked by railroad mortgagees to appoint a receiver pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of the cause, if required in the due administration of justice and the enforcement of the equities of the respective parties.

When the current earnings of a railroad, which ought, in equity, to have been employed to pay *current debts*, contracted before the receiver's appointment, for labor, supplies, and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road or for valuable and lasting improvements, it is competent for the court to restore what has been thus improperly diverted, and to direct such

current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors.

This doctrine of restoration of the fund rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are, in a sense, trustees of these earnings for the benefit of the different claims of creditors, and if they gave to one class of creditors that which properly belongs to another, the court may, upon an adjustment of accounts, so use the income in its hands as to restore, if practicable, the parties to their original rights.

This case, as well as the cases which followed it, further establish the proposition that the claims of the general creditor can never take priority over the mortgage creditor except when it is shown that such general creditor has, upon the principles of courts of equity, a superior equity to the lien creditor. No general rule can be laid down on the subject, but such claim must be determined upon the particular facts showing its peculiar equity.

Now let us examine the claims of the interveners in this case and see whether, according to the principles of the decided cases, above referred to, they have established equities superior to those of the lien creditor.

The first to be noticed is that of Lewis McKenzie. He was president of the Alexandria, Loudoun and Hampshire Railroad, and of the Washington and Ohio Railroad after the former was merged into the latter by the reorganization of the road under the act of the general assembly passed 20th day of March, 1870. His claim is for the balance due him on account of his salary as president, which he fixes, in a statement accompanying his sworn answer, as due on 31st December, 1877, with accrued interest, at the sum of \$6,527.11. As to this claim it is sufficient to remark, that even if the claim for salary of the chief officer of the road, who had the control and disbursement of its gross earnings, can, by the utmost stretch of the decided cases, be brought within the meaning of the principle that claims "for labor, supplies, and permanent improvements, which enhance the value of the mortgaged property, and thereby increase the value of the security held by the mortgagees," have priority over those of the lien creditors—I say, if such a claim, for balance due a president of the road for his salary, comes within the class of cases in which the courts have accorded superior equities to the lien creditors (to which I cannot consent), yet it is plain from the record that McKenzie has waived this claim to superior equity over the lien creditors, if he ever had any, by his published annual reports as president of the company from 1854 to 1877 inclusive (except the years from 1860 to 1869, which embraced the period of the war, and when the road was under the control of the United States Government), in which he

puts regularly each year among the paid items his salary for each year. If his salary was not in fact paid (as it seems it was not), McKenzie is only a general creditor, trusting to the credit of the company, and by his own official statement, published to show to the world the condition of the company of which he was president, declaring that his salary had been paid, and if not paid, making, by this official statement, the company the depository of his claim.

All that can be said is, if his salary was not in fact paid, as he published to the world that it was, he stands in the position of a general creditor whose claim is secondary and subordinate to those of the lien creditors.

His claim is certainly not one which, under the decisions of the Supreme Court of the United States and of this court, is entitled to be considered as a claim of superior equity to that of the lien creditors.

I am of opinion that the Circuit Court was right in rejecting this claim.

The next claim to be considered is that of Reid, receiver of the Farmers' and Mechanics' Savings Bank.

This claim may be disposed of in a few words.

Reid claims a primary charge upon the trust fund by way of substitution for creditors of the company, on account of necessary current expenses incurred prior to the institution of this suit. He claims that the money lent by the Farmers' and Mechanics' Savings Bank was lent for the purpose of, and appropriated to the payment of these creditors. How the money loaned by the bank was used is a mere averment of the petition, and is not established by satisfactory proof. But if it were so established, it would not make a claim of superior equity to that of the lien creditors.

One thing is established by the proofs, which is conclusive of this claim. The bank discounted the paper of the Washington and Ohio Railroad Company solely upon the credit of the company, and upon collaterals deposited by the company with the bank. The acceptance of these collaterals was in itself a recognition of the subordination of the claim of the bank to the lien of the bondholders, and is sufficient to estop the bank from setting up the claim preferred in the petition. The loan was negotiated upon the credit given to the company, secured by collaterals put up at the time of the loan. These collaterals were bonds of the company, secured by its deed of trust double in face value of the amount of the loan. The credit was given to the company and its bonds put up as collaterals for the loan. It is plain, upon the facts proved, that the bank stands in the position of a general creditor; that it has no superior equity to the lien creditors, and it follows that the Circuit Court was right in rejecting its petition and denying the priority of its claim.

The next claim to be noticed is that of Adams, Hamner & Co.—another and the last interveners in this suit.

This claim is for the sum of \$2518.52, with interest from 3d December, 1877. This sum of money, they aver in their petition, is "due them as contractors for constructing and building an extension or addition to said railroad to and beyond Round Hill, a point on said railroad, as it is now constructed."

This claim cannot be said to be one, under the decisions of the Supreme Court of the United States and of this court before referred to, which takes priority over the lien creditors. But the principles of these cases I think expressly exclude such a claim. It is a claim of contractors for the construction of the road or its extension. It in no sense comes within the category of those cases in which the courts have declared a prior equity over creditors secured by mortgage or deed of trust.

On the contrary, no case can be found, and no respectable authority can be furnished, which holds that the claim of contractors for the construction of a railroad will override that of the bondholders secured by a mortgage or deed of trust on the present and after acquired property and franchises of the road.

The well settled doctrine is, that mortgages of the road and present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, constitute a prior lien upon the net earnings of the road and upon all its property, both present and subsequently acquired.

The petitioners, Adams, Hammer & Co., whose claim is for construction of a part of the road, are but general creditors, having no superior equity to the lien creditors which a court of equity will prefer to the bondholders secured by deed of trust.

I am of opinion, therefore, that the Circuit Court did not err in rejecting the claim of the petitioners, Adams, Hammer & Co., and declaring that such claim must be subordinated to the claims of the lien creditors.

Having now disposed of all the claims of the interveners in this suit, we come now to consider the appeals of Addison and others and Blythe and others.

They may be considered together, as they involve substantially the same questions.

In both cases the right of the complainants, Lewis and McComb, to relief in a court of equity is assailed upon three grounds, and these grounds may be briefly stated as follows:

"1st. It is claimed that the contract of July, 1869, under which the advances were made and the Alexandria, Loudoun and Hampshire bonds delivered, was invalid, and so tainted with fraud as to deny any claim even to return of the money advanced.

"2d. That the associates were guilty of default by non-compliance with their covenants under that contract, and that their de-

fault occasioned damage to the company exceeding the amount of money advanced under the contract.

"That the compromise of 1874, being based upon the void contract of 1869, and advancements made under it, is not binding upon the company, or upon the Washington and Ohio bondholders, because the board of directors, in assenting to it, acted *ultra vires*."

An intelligent understanding of these positions, so ably maintained in argument by the learned counsel for the appellants, makes it necessary to refer to the contract of 1869, and the circumstances under which that contract was entered into.

I cannot better state these circumstances than by adopting the language of the learned judge of the Circuit Court, after carefully examining the record which establishes the verity of the facts he has so well grouped together.

"The Alexandria, Loudoun and Hampshire Railroad Company was at that time in a condition of extreme financial embarrassment. It possessed what was believed to be a valuable franchise, and a completed road of some 45 miles in extent, but with a terminus which assured to it no other income than what might be realized from the mere local patronage. Eighteen hundred thousand dollars of money had been expended in the construction of this road, but its then revenue was scarcely more than adequate to meet its actual current expenses. It was embarrassed by a comparatively small debt, but small though it was, it sufficed to retain the road in the hands of the United States government for the repayment of advances, and the period of its release and return to the control of the stockholders was then indefinite. The State of Virginia, and the people adjacent to the road, including the coporation of Leesburg, had contributed liberally, but, impoverished and exhausted by the war, they were unable to proffer any further assistance. It was, therefore, absolutely necessary to invoke the aid of outside capitalists. The means of prosecuting the road could only be expected in one of two ways—by subscriptions to the stock of the company, or by the purchase of its bonds secured by lien upon the road, franchises, etc., of the company. No reasonable hope could have been entertained of subscriptions to the stock by mere outside parties. One million eight hundred thousand dollars of stock was then in existence, and after the acquisition by the company of full title from the State to its stock, which was postponed till full payment of the purchase money—even if that stock were to be regarded as then extinguished, there would still remain some \$600,000 of stock. This stock was practically valueless. The State of Virginia had just sold more than a million of it upon terms of long credit, and no security but the prospects of the company, for five dollars per share, and as that sale carried with it the power of controlling voice in the company, we may fairly estimate that element

of power as the predominating consideration in estimating the agreed value. Municipalities, and counties, and citizens, and property holders along the line of the projected route might be supposed to be willing to come in upon an equal footing with these original stockholders, but certainly no outside capitalists could have been approached with any such suggestion.

"The only hope, therefore, was to raise the necessary money by a sale of the mortgage bonds of the company. To do this required competition in the great money markets of America and of Europe with a hundred other railroad enterprises, many of them with at least equal promise of security for principal and interest to the bondholder, and commended to the acceptance and confidence of purchasers by patrons and middlemen of imposing influence in the financial circles. The co-operation and active agency of some such patrons and middle men was, therefore, a necessity of the occasions. This could only be accomplished in one of two ways, either by selling to them the entire issue of bonds, or by otherwise identifying their interests with the fortunes of the road.

"To accomplish this object was the purpose and intendment of the contract of July 2, 1869. There was a prior contract between the company and McComb, Chadwick and others, of date March 22, 1879, but that contract having been construed as binding the contractors to sell and account for so many of the bonds as might be necessary to complete the road to Winchester, it was by mutual consent set aside and the contract of July agreed upon and executed.

"By that contract the associates undertook to build, etc., the road to Winchester, within three years, or within such longer period as might be found necessary for the successful negotiation of bonds; to make an immediate advance of money to extinguish the floating debt of the company and to make sale and account for the next proceeds of the bonds and all subscriptions of stock delivered to them at as good and fine market prices as could be obtainable therefor. Out of the proceeds of these sales the money advanced by the associates to pay off the floating debt, as above mentioned, was to be returned first, and then such sums as they should contract to pay for construction of the road with the costs of superintendence, interest at 8 per cent, etc., etc. Upon the other hand, the company contracted to make sale of no bonds except through the associates, and to deliver to them all moneys and securities received on account of subscription of stock, and from time to time as might be necessary, the mortgage bonds for negotiation and sale."

These are all the material points of the contract of 1869.

The purpose of the contract was to purchase the active agency of the associates by identifying their interests with the road, and entrusting its fortunes to their protection and control, and the

only consideration to be paid by the stockholders was a participation of the associates with them in the increased value of the stock, which was to be consequent upon the success of their efforts.

The United States government has found it a not unwise policy, so far as the money value of her public lands has been affected, to make gratuities to projected railways of alternate sections of land along its pathway, reserving to herself alone the compensation in the enhanced and available purchase money of the reserved sections. And almost contemporaneously with the negotiations between the Alexandria, Loudoun and Hampshire Railroad Company and these associates, the States of Virginia and West Virginia, the city of Richmond, and other corporations and counties, and private citizens who had contributed large amounts of money to the Virginia Central and the Covington and Ohio railroads, deemed it wise and judicious to purchase the agency of capitalists in the completion of our great Central Virginia road by an absolute donation of the stock held by them in those two corporations.

These are the circumstances under which the contract of July, 1869, was entered into. The associates under that contract advanced the large sums of money they agreed to advance to pay the floating debt, etc. They are now seeking to receive back out of the fund the moneys which they advanced to the company. They are met with the objection to the payment of this just demand, that the contract of July, 1869, under which they advanced their money, is void in toto, because two of the associates, McComb and Ames, who were parties to the contract and advanced their money, were directors of the company, and that, therefore, any contract made with them was void ab initio.

This position of the learned counsel is sufficiently answered by the Supreme Court of the United States in *Twin-Lick Oil Company v. Marbury*, 1 Otto, 588-9, in which precisely the same point was urged as in this case. Mr. Justice Miller, in a very able opinion, concurred in by all the justices, says, "that a director of a joint stock company occupies one of these fiduciary relations upon his dealings with the subject matter of his trust or agency, . . . is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others. The general doctrine, however, in regard to contracts of this class is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it."

"The directors," he continues (and this view is so applicable to the case before us that I quote further from the opinion), "are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its

stock. One of the objects of creating a corporation by law is, to enable it to make contracts ; and these contracts may be made with its stockholders as well as with others. . . . So when the lender is a director, charged, with others, with the control and management of the corporation, representing in this regard the aggregated interests of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him, etc. His acts are subjected to more severe scrutiny. . . . But all this falls far short of holding that no such contract can be made which will be valid." . . . No adjudged case has gone so far as this. Such a doctrine (declaring all such contracts void), while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and those qualified to judge of the necessity of that aid, and of the extent to which it may be safely given.

I think this case correctly and forcibly lays down the principles of law which govern the case before us. The action of the board of directors was not void because the contract was made with two of its directors, but was voidable only at the election of the "party whose interest has been so represented, by the party claiming under it."

But in the case before us, the parties interested, fully cognizant of all the provisions of the contract made with these associates, whom of course they knew to be directors, expressly ratified and approved the contract. This is abundantly shown by the record. They are now estopped from declaring the contract void.

I am further of opinion that the second objection urged against the claim of the associates—to wit: "that they were guilty of default by non-compliance with their covenants under these contracts," "and that such default occasioned damage to the company exceeding the amount of money advanced (by the associates) under the contract"—is not well taken and is not sustained by the record.

While the contract contemplated a completion of the road to Winchester within three years, it expressly provided for an indefinite extension of the time, dependent upon the successful negotiation of the bonds. A large discretion was confided to the associates as to the time when, and price for which, the bonds were to be sold.

It would protract this opinion (already too long) to too great length, to go minutely into the evidence on this branch of the case. It is sufficient to say that the associates honestly and fairly made every effort in their power to negotiate these bonds in the money markets of the world. For this purpose they sent their

agent to Europe, but the agency proved unsuccessful, without their fault, but owing rather to the stringency of the times and want of confidence generally in the money markets in railroad securities. But the company, if it ever had any claim for damages for non-compliance, on the part of the associates, with their contract of July, 1867, deliberately relinquished such claim by the compromise of 1874. The officers of the company were charged with the conduct of its business and had full authority to make such settlement as to it might seem judicious and right; and having relinquished any claim for damages, or otherwise, which they might have against those associates, by the compromise of 1874, such claim cannot now be set up by the creditors in these proceedings.

The third ground upon which the claim of the associates is assailed—to wit: “that the compromise of 1874 was ultra vires, because based upon the contract of 1867, which was a void contract”—need not be further noticed, because we have already held (*supra*) that the contract of 1869 was a valid and binding contract.

We now come to consider the only remaining question, which was preferred in argument with great earnestness and ability.

It is insisted that the bonds of the Washington and Ohio Railroad Company, which were exchanged with the associates for the Alexandria, Loudoun and Hampshire Railroad Company, had been dedicated by the charter of the new company, and by the act of assembly, to the construction of the road alone, and that they could not be diverted to any other purpose, and that the appropriation of these bonds to the payment of the money advanced by the associates, was an improper diversion, and therefore ultra vires.

Looking to the act of assembly, Acts '69-'70, page 29, authorizing an extension of the road from Hamilton station westward, and changing the name of the company, we find it authorizes the company to borrow \$15,000,000, “and to issue bonds therefor, and to sell said bonds at the best price that can be obtained for them,” etc., etc. There is nothing in this act, upon its proper construction, that directs any specific appropriation of the money to be raised by a sale of these bonds. There is certainly nothing in that act that prohibits the company from paying off its existing debts. It would be strange, indeed, if the act should have contained any such prohibition.

In entering upon a new enterprise with enlarged franchises and for a further extension of its road, it would seem that the natural thing, and the right thing for the company to do in order to maintain its credit, and to go upon the markets of the world with any hope of borrowing money, would be first to pay off its floating debt and existing liabilities. It could obtain no credit without first providing for the payment of its floating debt. While the

main object of the act creating the new charter was the extension and construction of the road, the act does not, in terms or by fair construction, make any specific appropriation of the money to be raised by the sale of the bonds.

But the resolution of the stockholders acting under the new charter created by this act, and which is incorporated in the mortgage or deed of trust, is very specific, as shown by the following resolution:

"Resolved, That in order to raise the funds requisite for the construction of the company's railroad from Hamilton station westward, in pursuance of the charter, and for the stocking and equipment thereof, and for other lawful and proper purposes connected therewith, . . . they are hereby authorized and empowered, . . . to execute and issue the bonds, . . . and to dispose of said bonds for the purposes aforesaid, upon such terms as they shall deem expedient, and for the best price they can obtain."

Now, certainly it was a "lawful and proper purpose" in connection with the extension and construction of the road, that its floating debt should first be paid before the new enterprise contemplated could be prosecuted with success.

Both individuals, and corporations, and states enhance and establish their credit by the payment of their debts. And it was most essential to the new company that the floating debt of the old company should be paid before there could be any reasonable hope for the successful negotiation of the bonds of the new.

The amount due the associates from the Washington and Ohio Railroad in 1874, when the compromise was effected, was the sum of \$200,000, with interest from 1867. This was for money advanced "to pay off the floating debt and liabilities now (then) existing." To secure to them (the associates) the repayment of the money thus advanced, the company transferred to them the bonds of the Alexandria, Loudoun and Hampshire Railroad Company, at the rate of 150 per cent, to be held as collaterals. These collaterals might have been sold by the associates, and the immediate foreclosure would have been the result. Certainly it was to the interest of the company and of the bondholders at that time to prevent this.

It was, I think, under the terms of the charter and the mortgage, "a lawful and proper purpose" to use the bonds of the Washington and Ohio Railroad Company to pay off the floating debt of the old company, and that such appropriation was not a diversion of these bonds from legitimate use, and was not ultra vires.

Upon the whole case, I am of opinion that there is no error in the decree of the Circuit Court of the city of Richmond, and that the same should be affirmed.

ANDERSON, STAPLES and BURKS, J. J., concurred in the opinion of CHRISTIAN, J. MONCURE, P., absent.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the said Circuit Court of the city of Richmond, rejecting the petition of the parties who intervened in the proceedings in said court, nor in rejecting the petition of the appellant, M. Gillen. And the court is further of opinion that there is no error in said decree establishing the claims of the appellees and directing a sale of the road-bed, franchises, property, etc., of the Washington and Ohio Railroad Company. It is therefore decreed and ordered that the decree of the said Circuit Court of the city of Richmond be affirmed, subject to the modification hereinafter specified, and that the appellees recover against the several appellants in each case \$30 damages, and their costs by them expended in defending the appeals and writs of supersedeas here. And on motion of the appellees, without objection on the part of the appellants, it is further decreed and ordered, that unless the said Washington and Ohio Railroad Company, or some one for them, shall pay the debts decreed by the said Circuit Court to be paid, both principal and interest, within ten days after the rising of this court, the commissioners appointed by said decree shall proceed to execute the order of sale as directed therein.

Decree affirmed.

We have already presented to our readers a brief review of the law relating to receivers' certificates. See note to *Langdon v. Vermont & Canada R. R. Co.*, 4 Am. & Eng. R. R. Cas. 83. We now propose to present to them a sketch of the law relative to the power of a court of equity upon appointing a receiver at the suit of mortgage bondholders, to make provision for the payment by such receiver out of the income of the road while operated by him, of the claims of employees and material men accruing prior to the inception of the receivership. The subject is a very important one but it is only of late that it has been practicable to lay down the law upon the point with any approach to certainty.

The appointment by a Court of Equity of a receiver to take charge of the property of an insolvent railroad company is a matter of grace on the part of the court, not a matter of strict right on the part of the mortgagees. Hence it is competent for the court to impose what terms it pleases upon the mortgagees as a condition of such appointment. In many instances the assent of the mortgagees is expressly given at the time of the appointment of the receiver to the application of a certain part of the earnings of the road while in his hands to discharge prior indebtedness. *Turney v. Atlantic & Great Western R. Co.*, 58 N. Y. 858, reversing 2 *Thomp. & Cook*. 446. Where such assent authorized the payment from said earnings of all debts "owing to laborers and employees for labor and services actually done in connection with the company's railway" this was held to include a counsel fee for \$5000 outstanding and unpaid at the time of the appointment of the receiver. *Ibid.*

And where the mortgage in question contained a specific provision that if the mortgagees took possession of the road, they should first pay out

of the earnings the current expenses, it was held that a similar application would be ordered of the earnings of the road while it was in the hands of a receiver appointed on the application of such mortgagees. *Poland v. La Morille Valley R. R. Co.*, 52 Vt. 144.

Independently, however, of any specific provision on the mortgage or of any agreement on the part of the mortgagees the following rule has been laid down as that which will govern the courts in every case.

"When a Court of Chancery is asked by railroad mortgagees to appoint a receiver pending proceedings for foreclosure, the court in the course of a sound discretion may as a condition of issuing the necessary order impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, as may under the circumstances of the particular case appear to be reasonable. If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of the cause, if required in the due administration of justice and the enforcement of the equities of the various parties." *Fosdick v. Schall*, 9 Otto 235.

In accordance with this doctrine it is now not unusual for courts in appointing a receiver to insert into the order of appointment a provision that outstanding indebtedness shall be paid from prospective earnings. *Taylor v. Phila. & Reading R. R. Co.*, 7 Fed. Rep. 377. See *Atkins v. Petersburg Railroad Co.*, 3 Hughes, 313.

It is clear from the foregoing that it is not in every case that the earnings of the road during the receivership will be in part appropriated to prior claims. Such a doctrine would lead to gross injustice in many cases. It is only where such claims have special equities attached to them that such appropriation will be ordered. Claims for damages during the operation of the road by the company have no such equity. In *re Dexterville Mfg. & Boom Co.*, 4 Fed. Rep. 378.

It becomes necessary therefore to inquire what is a sufficient equity on the part of such claims to entitle them to share in the earnings during the receivership. Three distinct equities have been set up in such cases which will be considered in succession.

1. An alleged equity arising out of an attempted extension of the doctrine of maritime liens to the case of railroads.

It has been contended that since labor and materials furnished to the road prior to the receivership are usually the efficient means to keep the same running and communicate to it its chief value as a going concern, therefore claims for such labor and materials should have a certain priority in lien upon the earnings of the road. Otherwise it is said great injustice would result. Those whose work and property have been most instrumental in benefitting and assisting the mortgagees would be without remedy. This equity we believe not to be sufficient to induce the court to make an order such as we have under discussion. The language of some cases might lead the reader to a different conclusion. *Williamson's administrator v. Washington City, etc., R. R. Co.*, 33 Gratt. 624; 1 Am. & Eng. R. R. Cas. 498. But the great weight of authority is to the effect that the principles of maritime liens cannot be extended to railroad companies. *Galveston Railroad v. Cowdrey*, 11 Wall. 459; *Dunham v. Cincinnati & Pens. R. Co.*, 1 Wall. 254. Claimants for material furnished to an insolvent company have no lien whatever upon a fund in court in case of foreclosure, as against prior mortgagees. *Deniston v. Chicago, Alton & St. L. R. R. Co.*, 4 Biss. 414. And where the officers of the road advance money for the preservation of the property, they cannot upon the appointment of a receiver claim any lien upon the rolling stock prior to that of a mortgagee. *Receivers of N. J. Midland R. Co. v. Wortendyke et al.* 27 N. J. Eq. 658.

2. An equity in the nature of an estoppel arising out of the failure of the mortgagees to take the road out of the hands of the company after the latter has become notoriously insolvent.

This equity we believe sufficient to warrant the court in making such an order as we have under discussion. Where after default in the payment of interest on the mortgage and after the company has become notoriously insolvent, the mortgagees still permit the company to retain possession of the road, it may be urged with great force that as far as the employees and material men are concerned the officers of the company are to be regarded as merely agents of the mortgagees. The employees may therefore be regarded as giving credit to and contracting with the mortgagees and not the company and upon the appointment of a receiver it seems but just that the earnings of the road should be appropriated to their claims.

Such was the doctrine enunciated in *Douglass, etc., v. Cline et al.* 12 Bush. 609, by the Court of Appeal of Kentucky.

"The claims of the appellees which the Chancery Court directed to be paid were for work and labor done and performed by the company after default had been made in the payment of the interest due on the mortgage." With regard to these claims the court said in its opinion: "It was through the labor and services of those appellees performed and rendered after the railroad company had become notoriously unable to meet its indebtedness, and during a period when these appellants, either could not or would not interfere to protect and preserve their mortgage security, that the company's roads were operated and its duties discharged; and as we have already seen it was by this labor and those services that said mortgaged property during this period was preserved and kept in repair. It is plain therefore that the debts due to the appellees were contracted for labor which resulted in substantial advantage to the parties who are here insisting that their payment out of a fund to whom said parties have no legal or contract claim and which they can only reach through the intervention of the chancellor, is an abuse by that officer of his equitable discretion."

The court was careful in this case to confine its decision to the particular circumstances involved, and disclaimed any intention of extending the principles laid down to general creditors. Each case, it declared, must stand on its individual merits. The authority of the case is somewhat weakened by an unusually learned and elaborate dissenting opinion.

Precisely the same result was reached, however, in a similar case in the Circuit Court of Richmond, Va., in an elaborate opinion by Willford, J., in the course of which the law is thus admirably stated:

"The Chesapeake and Ohio R. R. Co. had been so long in default that the right of the landholders to claim possession was fully consummate, and this was a matter of common notoriety. It could not be expected that the employees all along the track of this road would pause amid their unceasing round of daily duty to inquire whether the landholders had or had not asserted their rights and assumed control. It was enough for them to know that the service they were rendering was such service as any proprietor would necessarily require, and they had a right to believe that the officers left in notorious occupancy of the property, and charged before the public with the responsibility of its care and custody, were abundantly authorized to act for all whom it might concern in contracting for their services. The same principle will run through all the gradations of employment in this great corporation. These employees of every grade and dignity had every right to believe that so long as the landholders stood aloof without asserting their rights to possession, they were willing to accept and regard pro tanto their agents, for the preservation and protection of the property, the officers who, placed in charge thereof by their defaulting debtor, could not in good faith to the creditor or the debtor abandon their posts or be derelict, while

they held them to the trusts which they imposed. These bondholders are now in a court of equity seeking satisfaction of their claims against the railroad company. They have a right to be satisfied to the extent of an entire forfeiture of all the proprietary rights of the company; but to concede to them in enforcing such forfeiture a right to repudiate all responsibility to satisfy these highly meritorious claims of employees, etc., out of the property of its future earnings, would be grossly inconsistent with plain equity. In this forum they must be held to be estopped from denying the authority of the officers of the company under the circumstances, as agents for themselves as well as other parties in interest, to have incurred such liability." *Duncan v. Trustees of the Chesapeake and Ohio R. Co.*, 9 Am. Ry. Reports, 386 S. C. 8 Cent. L. J. 579. The subject is thus summed up in an article in 4 Cent. L. J. 478:

"Where a railroad mortgage empowers the trustees after default in the payment of principal or interest to take possession of the road and operate it or sell it for the benefit of the landholders, and they neglect to exercise this power, and after default a notorious insolvency still leaves it in the hands of the company, and the company contracts for supplies in order that it may be kept in operation with safety to the public, can the mortgagees, standing by and looking on while this is done, afterwards step in and take to themselves whatever betterments the property thus receives, without any compensation to those who have furnished them? Is not the rule of admiralty, after all, a good one to apply to a railroad thus situated? We believe it is. A railroad is not like ordinary property; it is a public agency. It must be kept in a safe condition and must be continuously operated for the carriage of the mails and otherwise for the benefit of the public. . . Is not the corporation to be deemed under such circumstances a mere tenant at will and agent of the mortgagees, and should not the material man be treated as having given credit to the latter and not to the former?"

The doctrine is again adverted to in *Williamson's Admr. v. Washington City*, etc., R. Co., 38 Gratt. 624; 1 Am. & Eng. R. R. Cas. 499; but is not the ground of decision in that case. In *Hall v. Frost*, 99 U. S. 389, the Supreme Court of the United States expressly declined to pass upon the point, holding it unnecessary to a decision in the case.

It seems formerly to have been considered that the doctrine which we have just been discussing was the only one upon which the rights of claimants for work done or material furnished prior to the receivership could be founded. But in *Fosdick v. Schall*, 99 U. S. 235, still another equity on the part of such claimants was set up and allowed which it is also necessary to consider.

2. An equity arising out of the misappropriation of funds properly applicable to the claimant's debts. This equity requires some explanation.

While a railroad company remains in possession of its road the income therefrom is generally applicable to current expenses of its management and is not subject to the lien of a mortgage. *Gilman v. Illinois and Mississippi Tel. Co.*, 91 U. S. 608. "The mortgagee is only entitled to be paid from the net income obtained by deducting from the gross earnings what is required for necessary and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."

If then in operating the road any of the income properly applicable to current expenses be diverted to pay the mortgagees thus leaving claims for work and material unpaid, "it certainly is not inequitable for the court when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from

the future current earnings before anything derived from that source goes to the mortgagees." *Fosdick v. Schall*, 99 U. S. 235.

To sum up the whole subject it may be said: "The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to a whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of diversion."

The principle of *Fosdick v. Schall* was reaffirmed in *Hall v. Frost*, 99 U. S. 389, and has since been followed in several other cases. *Williamson's Admr. v. Washington City, etc.*, R. R. Co., 33 Gratt. 624; 1 Am. & Eng. R. R. Cas. 498; *Gibert v. Washington City, etc.*, R. Co., 33 Gratt. 645; 1 Am. & Eng. R. R. Cas. 512; *Addison et al. v. Lewis et al. supra*.

The language of the court in *Williamson's Admr. v. Washington City, etc.*, R. R. Co. *supra*, is particularly clear. "The mortgagee in taking the mortgage impliedly agrees that the current debts made in the usual course of business shall be paid from the current receipts before he has any claim upon the income; and if not so paid before the appointment of a receiver, they ought to be paid within reasonable limits from the net income of the road after such appointment."

In this case the equity invoked was particularly strong, as it appeared that the element of insolvency of the road long prior to the appointment of the receiver was also present. It was partly upon this ground that the case was decided, as the following extract from the opinion will show:

"If the latter (the mortgage creditor) through the instrumentality of a receiver obtains possession of a road properly appointed and equipped yielding valuable revenues, it is due in great measure to the class of men whose claims are the subject of controversy here. The mortgage creditor knows all these things. He certainly cannot be ignorant of the continued default in the payment of the interest due him—a fact of itself sufficient to attract his attention and excite his suspicions. And yet he leaves the company for years in the uninterrupted possession and control of the earnings of the road, and notoriously obtaining credit from third persons for supplies and labor upon the faith of those earnings. When, under such circumstances, the creditor calls upon a court of equity to intercept the revenues for his benefit, he cannot complain that debts thus contracted shall first be paid, within limits so just and reasonable as are now prescribed by our courts."

The case of *Fosdick v. Schall* extended its principle even beyond the limits which we have indicated. It gave priority to the claimant's demand out of the proceeds of a foreclosure sale. Such must now therefore be taken to be the true state of the case. See 8 Cent. L. J. 636, and unreported cases there referred to.

The conclusions which we have reached may be briefly summarized thus:

1. The principle of maritime liens cannot be extended to railroads. The mere fact that work and labor done or materials furnished to a road serve to keep it in running order and to communicate to it additional value does not therefore entitle the persons performing such work or furnishing such materials to the earnings of the road while in the hands of a receiver, in preference to a mortgagee.

2. Where after default in payment of interest on a mortgage and after notorious insolvency of the company the mortgagees still allow said company to remain in possession of the road and to contract for labor and materials, credit will be deemed to be given to the mortgagees and not to the company, and on the appointment of a receiver the income of the road while in his

hands will accordingly be applied to all claims for work and material accruing since the insolvency and default in payment of interest.

3. Where any part of the income properly applicable to such claims has been diverted to pay interest to the mortgagees, the court will on the appointment of a receiver make good out of the income earned by the road while under his charge the amount so diverted.

In New Jersey the claims of employees due at the time the road is placed in the hands of a receiver are provided for by statute. They constitute a lien upon all unencumbered personal effects and all moneys which may be transferred to the receiver at the time of entering on his duties, but no more than two months' wages can be recovered. Act of Feb. 12th, 1874, 2 Rev. Stat. 1877, p. 943, § 161. This lien of course has no effect as against a previous mortgage. *Williamson v. N. J. Southern R. Co.*, 28 N. Y. Eq. 287.

As to the dealings of the officers of a corporation with it, see note to *Wardell v. Union Pacific R. Co.*, 1 Am. & Eng. R. R. Cas. 485.

EX PARTE BROWN AND WIFE ET AL.

GIBBES v. GREENVILLE AND COLUMBIA R. R. Co.

STATE, EX RELATIONE ATTORNEY-GENERAL, v. SAME.

(15 *Shand's (S. Car.) Reports*, 518. 1881.)

Pending action to subject a railroad to sale for the payment of its mortgage debts, the president and directors of the company were ordered to continue in the possession and management of its property of all kinds under the order of and subject to the court; and such officers were in like manner to continue to conduct and carry on the business of the company and to make report to the court, when required, of the condition of the property of the company, of its earnings and expenditures, to the end that such orders might be moved for as were necessary for the protection of the property of the company and the interests of all parties concerned. *Held*, that by this order the president and directors, and their successors in office, were constituted receivers of the court. (Fifty-four Bonds Case, *infra*.)

A change of incumbent in the office of railroad receiver does not affect the status of claims against the property arising during the receivership.

Passengers over a railroad and an employee of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought.

Before HUDSON, J., Richland, July, 1880.

In this case. Hon. A. P. Aldrich, of the Second Judicial Circuit, and Hon. T. B. Fraser, of the Third Circuit, sat in the places of Chief Justice Simpson and Associate Justice McGowan, who had been of counsel in the original causes.

These were four petitions to be paid out of the fund in court, which was realized from the earnings of the Greenville and Columbia Railroad Company, while in the hands of the receiver, who

was appointed under the actions of James S. Gibbes and others, creditors, against the Greenville and Columbia Railroad Company, and the State, ex relatione the Attorney-General, against the same corporation. Ex parte E. M. Brown and Emily Brown, his wife; Ex parte William Cummings; Ex parte William H. Redwood, were petitions for the payment of judgments obtained by them against the railroad company in May, 1878, for injuries received by them while passengers over the road on June 1st, 1874, resulting from the breaking of a trestle. Ex parte Elizabeth J. Layne, administratrix of the estate of John Y. Layne, deceased, was for the payment of balance of \$1140 and interest due on judgment for \$2000, taken by her against the company by consent, in September, 1877, damages for the death of her husband and intestate, an engineer on the road, his death being caused by the bursting of a defective boiler, on January 23d, 1874. Other facts are stated in the opinion of this court.

The petitions were filed by leave of court and referred to N. B. Barnwell, Esq., Master, who made an unfavorable report. Exceptions were taken thereto by the petitioners, and the cases were heard by Judge Hudson, whose decree, after a statement of facts, was as follows:

The view I entertain of the law of the cases renders the payment or not of earnings to the interest on the mortgage debt, in preference of these judgments, not decisive of the issues; and although it may be that the interest was in fact not paid from earnings, but from funds otherwise raised, as the counsel for creditors claim they can show, yet, for the purposes of this contention, I am willing that it be conceded by the court that between the years 1874 and 1878, a portion of the earnings of the road was applied to payment of interest on the mortgage debt, sufficient to have paid all the claims of these petitioners. If the petitioners have a superior claim upon the fund, such payment was a diversion; otherwise, not.

With this statement of facts we proceed to examine the issues raised by the exceptions to the master's report. The whole matter may be resolved into a single question, viz., has a passenger or an employee who holds a judgment for damages to the person against an insolvent railroad company, which has been placed in the hands of a receiver, a right to be paid out of the net earnings of the road in preference of senior mortgage creditors? Is the legal or equitable right to this fund set up by such a judgment creditor superior to the legal and equitable right of a prior mortgage creditor?

The petitioners rest their claims upon a supposed prior and superior equity to this particular fund, contending that whilst the mortgagees have a superior lien upon the property, they have a superior equitable lien upon the net earnings; that they do not

stand upon the footing of ordinary and general judgment creditors, but of creditors whose claims are so peculiarly meritorious that a Court of Equity will, in the exercise of extraordinary power, displace existing liens and subordinate superior legal rights to these judgment claimants.

That they ought to be paid no one can deny, and that they will be paid is a fact, provided the assets of the corporation, in a due course of administration by the court, are sufficient. But if the assets of the company in the possession of the court, at the end of a legal and equitable administration, should fail to pay these debts, the petitioners are in no worse condition than the multitude of creditors who will have to go without pay. The question is not one of liability. It cannot be denied that a company, while managed by its own direction, is liable to demands of this kind, and where managed by a receiver as an officer of the court, it is equally liable out of its property to respond to unpaid claims of this kind, whether the cause of action arose before or after the judgment of insolvency and appointment of a receiver; whether the court may be solvent or insolvent, whether under its own directorship or the control of the court, does not affect the question of liability, but affects only the mode of establishing the debt and enforcing its payment.

So that whether a receiver can be sued in a court of law upon a demand of this kind, what is the effect upon the parties if they elect to sue the company, instead of going against the property of the company in the hands of the court; what is the effect upon their rights, whether the cause of action arose prior or subsequent to the appointment of a receiver, all such questions, in the discussion of some of which much learning has been displayed by our judges and text writers, do not, in my opinion, greatly affect the fundamental issues in these cases. The main question is one of priority and not of liability. The petitioners have a right to be paid; they ought to be and will be paid, if the property be sufficient; but they claim a right prior to that of mortgage creditors, to be paid out of the income in the hands of the receiver; and that claim of priority we will proceed to examine. When a railroad corporation becomes insolvent, its property may be taken out of its hands by the court and managed by an officer of the court. This step is taken at the instance of creditors, in order to have the property controlled, protected and managed for the benefit of existing creditors, whose rank and priority, as then existing under the law, remain and must remain unchanged. No court has the right or power to displace existing liens, to divest vested rights, or to derange that order in which creditors, by their own contracts, have classed themselves under the law. It would be alarming to creditors, if not a monstrous doctrine, if a court, having forcibly taken possession of the property of a railroad, should have the power to

upset the status of things and unhinge the vested rights of creditors by a rule of discretion resting on caprice.

Equity follows the law, and will not and cannot violate its mandates and behests. The harshness of the rules of law it will moderate, but then only to protect rights and prevent wrongs, which the rigid rules of law fail to do. Estates of decedents, and property of all kinds, coming into the control of a Court of Equity, will be administered by fixed and established principles, and not by caprice or fancy.

The property of the Greenville and Columbia Railroad Company is now being administered by this court. It has been brought here by creditors who ask this court to administer it, not for the benefit of the company, out of whose hands it has been taken, but for the benefit of the creditors. This the court has undertaken to do, and must do, and must, in so doing, have a sacred regard for the rights of creditors as fixed at the date of the forcible sequestration of the property by the court. But a material part of this administration consists in the management of the road as a highway for traffic and travel, and whatever is essential to this proper management, the creditors have asked the court to carry out. This also the court will do, and to all the necessary incidents of good management, the creditors have, by coming here, agreed and contracted to submit, and are bound to acquiesce therein, even though their liens and rights may be affected thereby.

The necessary expenses incurred in the management and preservation of the property, it is evident must be defrayed by the court. This must be done out of the earnings, and earnings alone, if sufficient; and if not sufficient, then out of the property, and this before any creditor can receive a cent of his debt. Wages of employees of every class, and all kinds of material and labor furnished in order to keep up the road, constitute the leading items of necessary expense. To produce income for the creditors these expenses are absolutely necessary, and upon every principle of equity, as well as from the implied agreement of creditors, who have forced the road into court; these expenses must be paid in preference of all outstanding debts. Beyond this the court will not go, nor allow its officers to go, in incurring new liabilities.

This is the doctrine of fairness, equity and good faith, and is established by the uniform current of the decisions of our courts and the doctrines of our text writers. High on Rec., §§ 390-398; Jones on Rail. Sec., ch. xix., §§ 557-566, and authorities there cited. Numerous decisions of the Circuit and Supreme Courts of the United States and the States might be referred to, all concurring in this leading doctrine as to the powers and duties of courts in running and managing insolvent railroads. The duty of the court is not to teach railroad officials how a railroad can and ought to be managed, but itself so to manage it as best to subserve the

interest, real not imaginary, of existing creditors, whose servant and agent the court has undertaken to be. Economical management and prompt sale, if sale must be had, should, therefore, be the sole end and aim of the court. Whatever, therefore, pertains to and is necessarily incident to the good management and preservation of the property, the court should do, and the creditors must submit to; but beyond this the court must not be led by caprice, taste, fancy or supposed kindness and mercy.

Therefore the petitioners, to succeed in their prayer for precedence, must show that the payment of their claims out of the income falls within this rule, and that such payment is necessary to the management of the road, and is to the interest of the mortgage bondholders.

The petitioners contend that their causes of action arose and their judgments were recovered while the road was in the hands of a receiver, and hence their equity to be paid out of the income. They say that the road was sequestered by the court in 1872, by the order of Judge Melton, and that the officers of the company were, by that order, made receivers; that the appointment of James Conner, in 1878, as receiver did not change the status of the road, but only made definite and complete the status which before was anomalous. The counsel for the bondholders, resisting these petitioners, contend that no receiver, properly so called, existed until the appointment of James Conner.

I deem the settlement of this dispute not necessary to their judgments, and will consider the question as if the position of the petitioners in regard to it is correct, and I hold that the claims of the petitioners, admitting that they arose subsequent to the receivership, are no more entitled to priority over the liens of mortgage bondholders, as far as the earnings are concerned, than if they arose prior to the insolvency of the road and the appointment of a receiver.

Jones on Rail Sec., § 571, lays down the following doctrine:

In the further discussion of this point the author cites the case of *Davenport v. Alabama and Chattanooga R. R. Co.*, 2 Woods, 519, which was for damages to a passenger on that road while in the hands of a receiver.

In none of the authorities cited by counsel for the petitioners do we find anything to sustain their claim. All are in harmony with the above case, and the doctrine of the text of Mr. Jones. The case of *Fosdick v. Schall*, 9 Otto, 235, which is most relied upon by claimants' counsel, is not at all at variance with the above, and the law as laid down in *Davenport v. Alabama and Chattanooga R. R. Co.* is sound doctrine and well established.

It follows that the payment of income heretofore, if any has been paid, to interest on the mortgage debt, was not a diversion of

funds, which of right, or in equity, belonged to the petitioners, nor have they any equity to any part of the present income or future earnings, prior to the right of the mortgagees, to whom it belongs primarily after payment of expenses.

It is, therefore, adjudged that the judgment of the petitioners do rank with the other judgments according to date and lien in the distribution of the assets of the Greenville and Columbia R. R. Co., in the possession of the court, and that, as such, they are not entitled to be paid out of the income or property in preference of superior liens.

The exceptions to the master's report are overruled, and the same is confirmed.

The petitioners appeal to this court upon the following exceptions to this decree:

1. Because his Honor erred in ruling that the payment of income heretofore, if any has been paid, to interest on the mortgage debt, was not a diversion of funds which of right, or in equity, belonged to the petitioners.

2. Because his Honor erred in ruling that the petitioners have not any equity to any part of the present income or future earnings, prior to the right of mortgagees.

3. Because his Honor erred in adjudging that the judgments of the petitioners do rank with the other judgments according to date and lien in the distribution of the assets of the Greenville and Columbia R. R. Co., and that they are not entitled to be paid out of the income or property in preference of superior liens.

Mr. W. C. Benet for Brown and wife; Cummings and Redwood, appellants.

The orders of court prevented us from enforcing our executions against the property of the company. 2 Redf. on Ry. 510; 6 Rep. 331; High on Rec. § 163; 5 Wait Act. & Def. 354; 16 Wall. 218. Though we might have petitioned the court for payment. High on Rec. § 2. Under the order of Judge Melton, of July 2d, 1872, the president and directors of the company became receivers of the court. 4 Gratt. 187; High on Rec. § 5.

Our suits were brought against the corporation, but the directors, who were also the receivers, were served, and appeared and litigated, without objection. Objection has, therefore, been waived. 85 Ill. 558; 17 Alb. L. J. 209; High on Rec. § 396; 23 Ind. 553; 29 Vt. 421; 2 E. D. Smith, 519; Wait Ann. Code, § 134, f; 17 Wall. 451. There has been here a continuing receivership since 1872, and our claims extend to the fund in court, and not to the earnings only, which were in existence at the time the liabilities arose. 9 Otto, 235; 6 South. Law Rev. 548, 549; 107 Mass. 1; 18 Amer. Ry. Rep. 565.

The whole doctrine of receivers of railways is comparatively new, and is progressive and expansive. 6 South. Law Rev. 536;

16 Wall. 203; 18 Amer. Ry. Rep. 291; High on Rec., §§ 365, 390-392; 1 Wood, 336; 9 Otto, 389. Wages of laborers and other employees, materials, supplies and repairs are payable out of the receiver's fund. Cases *supra*, and 3 Cent. Law J. 578. Also, attorneys' fees. 8 Rep. 579; 58 N. Y. 368; 3 Otto, 352. Also, damages for goods lost. Jones on Rail. Secur., §§ 498, 512. Also, for injuries to employees. 20 Ohio St. 137. Also, for injuries received by others besides employees or passengers. 18 Wis. 74. Also, for injuries sustained by passengers. 4 Hun, 373; 26 N. J. Eq. 474; 17 Wall. 445; 20 Ohio St. 150; High on Rec., §§ 392, 395; Wood on Mast. & Serv., § 412. The effect of the appointment of a receiver is to take the property into the custody of the court, whose hand the receiver is; but his duties require him to operate the road, which is a common carrier. 5 Wait Act. & Def. 353, 354; High on Rec. § 1, et seq.; 2 Story Eq. Jur. §§ 829-833; 4 Gratt. 208; 4 Md. 85; 80 Ill. 467. The fund in the receiver's hands must be applied under the direction of the court. Neither the suing creditors nor mortgagees have any superior right to them. 11 Paige, 436; 10 Paige, 43; 1 Jones on Mort. § 160; 18 Amer. Ry. Rep. 234-237. The doctrine is given definite shape in *Fosdick v. Schall*, 9 Otto, 235. See Bisham's comments in 6 South. Law Rev. 543. Having taken possession of the road, the court should do exact justice; should enforce the legal remedies of parties enjoined. 5 Wait Act. & Def. 353; 2 Story Eq. Jur. § 798; 4 Rich. Eq. 201; and should do what the corporation could be compelled to do. Authorities, *supra*. The liabilities of a receiver are identical with the liabilities of the corporation. Authorities, *supra*; 38 Vt. 402; 6 Bosw. 627; High on Rec. §§ 395-398; 5 Wait Act. & Def. 379-385; 2 Van S. Eq. Pl. 427. Receiver is, therefore, liable for damages, injuries, expenses, claims, etc., if the corporation in charge of the road would be. So is he liable for injuries to passengers and employees, because this liability attaches to his duties. 1 Smith Lead. Cas. 101. Unless paid, business of road and value of its property is impaired. 1 Van S. Eq. Pl. 380; and because such damages are part of the expenses. Necessary expense is that which insures income. Employees are necessary to running the road, and passenger traffic produces income. *Davenport v. R. R. Co.*, 2 Wood, 519, stands alone, and is opposed by all the authorities, *supra*. Mr. Jones (Ry. Sec., § 571,) cites this case with approval, but finds no other authority for the doctrine quoted in the circuit decree; but see sections 498, 512.

Mr. J. E. Bacon, for Layne, appellant.

Messrs. Simonton and Barker for the receiver.

Judge Melton's order did not make the officers of the road receivers. High on Rec. § 1; 17 How. 331. Judge Pressley's order cannot make them receivers. If they were receivers, they should have been sued *eo nomine*. High on Rec. § 258. But

petitioners cannot be paid out of the funds in the hands of the receiver, for after appointment of receiver the income belongs to the mortgagees. 94 U. S. 800; 9 Otto, 245, 389. Earnings were not appropriated by the receiver to the bonded debt. There is no superior equity with these petitioners; the precise point has been adjudicated. 2 Wood, 519; Jones on Rail. Sec. § 571. The dictum of Chief Justice Waite in *Fosdick v. Schall* was a surprise to the profession.

Mr. S. W. Melton, same side.

FRASER, A. A. J.—The action in the above case, in which James S. Gibbes and others are plaintiffs, was commenced May 6th, 1872. On May 25th, 1872, an order was made by his Honor, Judge Melton, "that until further order of this court the said Greenville and Columbia R. R. [Co.] be enjoined and restrained from paying out or in anywise transferring and delivering to any person any of the moneys, property or effects of the said company, except so far as the same may be necessary to the keeping up and to the operating of the road of said company."

On June 11th, 1872, the action in the name of the Attorney-General was commenced. A motion was made for a receiver and other relief, and Judge Melton, by consent of counsel for the company and certain creditors, on July 2d, 1872, ordered "that any and all judgment creditors of the said company be restrained and enjoined from enforcing their said judgments against the property of the said company." The same order contained this further provision: "As the state cannot be required to give security as other plaintiffs, it is ordered that the president and directors of the Greenville and Columbia R. R. Co., under the order of and subject to this court, continue in the possession and management of the property of all kinds of said company, and in like manner continue to conduct and carry on the business of said company; that they make report to this court at such time as this court may require, of the property of all kinds of said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for as may be necessary and proper for the protection of the property of said company and of the interest of all parties concerned, pending litigation."

Affairs continued in this situation until November 23d, 1878, when Judge Pressley made an order in which it is said: "I consider that the said order of Judge Melton did make the officers of the Greenville and Columbia R. R. Co. officers of this court, and responsible to it in the character of receivers; but they have not executed the proper bond nor have they filed their accounts or performed the other duties required by that order. It is therefore imperative on me to put an end to that condition of the property and to place it more substantially in the hands and under the custody

and order of this court. It is therefore ordered that James Conner, Esq., be, and he is hereby, appointed receiver of all and singular the property and assets, rights, credits and franchises of the corporation defendants, the Greenville and Columbia R. R. Co; that he do forthwith demand and receive possession thereof, . . . and the same safely keep and preserve, subject to the control, order and direction of the court, with power and authority to manage and operate said railroad, to receive the income and earnings thereof, and of the same to disburse whatever may be necessary for the expenses of running said road, and with all the other and further power and authority as may be conferred by the decree of this court hereafter to be filed. It is further ordered that all and singular the creditors of the said the Greenville and Columbia R. R. Co. be, and they are hereby, enjoined and restrained, . . . from enforcing judgments against said company."

After this order was made, James Conner, as receiver, took charge of the road and all the property of the company and for some time conducted the operations of the road very successfully, and, after meeting all current expenses of his administration and investing a considerable sum out of the income in necessary rolling stock, etc., had on hand and has turned over to the master of this court a considerable sum arising from income.

By the order of the court the road and all its outfit and all the property of the company have been sold by the master. The sum realized was sufficient to pay all the first mortgage bonds and the guaranteed bonds. The second mortgage bonds constituted a third lien on the property, and after exhausting the proceeds of the sale and all the surplus of income, there would still be a large deficiency in the amount necessary to pay these bonds.

The petitioners in the cases before the court are not lien creditors. They claim, however, that they have a right to be paid out of the income; that their claims were expenses incurred during the period in which the railroad was in the hands of a receiver, or if not a receiver *eo nomine*, in the hands of persons appointed by, responsible to, and acting under the orders of the court which had enjoined the enforcement of judgments against the property of the company.

The petitioners have unnecessarily complicated their cases by suing them to judgment in the Court of Common Pleas, in which they are severally parties plaintiffs and "The Greenville and Columbia Railroad Company" defendants.

The first three cases were claims for injuries done to passengers, June 1st, 1874. The amount of the judgments are for Brown and wife, \$8137.15; Redwood, \$2636.85; and Cummings, \$2650.90. The last case was for injury resulting in the death of John T. Layne, an engineer in the employ of the company, or rather of those who, under the order of the court, had charge of the road

and directed its operations. The injury resulted from a defective boiler. In this case there was a judgment by consent of the counsel of the administratrix and the counsel of the managers of the road. "The president and directors" had the company represented by counsel in these cases and, so far as appears, raised no objection to the appearance on the part of the company. It is not clear that there could have been any valid objection raised to a suit against the company, as only the enforcement of judgments was enjoined.

These claims are all pressed in this case not on account of their rank as judgments, but on account of the cause of action on which those judgments are based. It would have been more regular to have based the claim in this court at once on these several causes of action. This, however, would have opened the cases anew and led to a very long and expensive investigation. It is as well, therefore, and perhaps the duty of this court to disregard the mere form and treat the judgments as they seem to have been regarded by all parties as sufficient evidence of the nature of the claims and the amounts due on them severally. These claims were referred to the master, were reported on unfavorably and the report confirmed by the circuit judge, and this appeal is from his ruling. Claims for cotton lost and also counsel fees for professional services rendered after the commencement of the proceedings by the creditors against the Greenville and Columbia Railroad Company, have been paid out of the income made by the receiver, James Conner, but it does not follow that these claims, which are contested by the lien creditors, should also be paid out of the fund; they must stand on their own merits.

These claims arose during the management of the road by "the president and directors," under the order of the court and before the appointment of "Receiver Conner." The president and directors did not turn over to Receiver Connor any surplus of income and it was claimed by the petitioners and conceded for the purposes of these cases that a considerable amount of the income during the administration of the president and directors was paid out as interest on the bonds held by the lien creditors. The fact was not settled by the presiding judge, but it seems not to have been seriously questioned in the argument, and in the view taken by this court of these cases it is not material what the fact is. The question of a diversion of the income to interest becomes important when claims which ought to be paid out have not been paid and such income has been diverted to the payment of interest, and the question is whether such income so diverted should not be restored out of the sale of the property. In this case there is no such question. There is a considerable sum turned over by the receiver to the master and now under the control of this court.

If the order of the court of July 2d, 1872, created a receivership in fact, then the mere transfer of that office to Receiver Con-

ner certainly cannot have the effect of invalidating claims which were good under the first administration. The management of court is one even if it becomes necessary to change the receiver, once, twice or often. Claims against receivers would stand on a very unstable basis if they could be defeated by a change which could so easily be made. The questions, therefore, are these:

1. Was the order directing "the president and directors of the Greenville and Columbia Railroad Company" to continue in the possession and management of the property of all kinds of the company" and "to conduct and carry on its business under the order of and subject to this court," and "to make report," that orders . . . "may from time to time be moved" for "pending litigation," the appointment of a receiver? If not in name was it so in substance?

2. What are the relations of such a receivership to third parties with whom it may have transactions in reference to the property and business of the corporation shippers, passenger, employees, etc.?

It is true, that this order of July 2d, 1872, was somewhat anomalous. It was without bond that the president and directors of the Greenville and Columbia Railroad Company were intrusted with valuable property, but they were not the owners of the property, and it was competent for the circuit judge to dispense with the security, and if, in his judgment, they were proper persons for the appointment, it was in his discretion to make it. It is true that it was no individual by name that was appointed, but it was an organized board whose identity was provided for and secured by the rules laid down for preserving the vitality of the corporation whose exponent it was. It is, perhaps, a peculiar appointment, but it was competent for the court to make it. See High on Rec. 66, 67, 68, 81, as to persons to be appointed.

All the essential powers of a receiver were conferred by this order. It is the business of the receiver "to receive and preserve the property" pendente lite—"the court itself having the care of the property by its receiver." The receiver has no powers other than those conferred on him by the order of his appointment, or such as may be derived from the established practice of Courts of Equity. High on Rec. 1.

These officers, "the president and directors," were ordered to continue in the possession and management of the property" and "conduct and carry on the business of the company," and "make reports," that further "orders" may be made. In the order of Judge Pressley, of November 23d, 1878, James Conner was appointed receiver eo nomine and he was required "to demand and receive possession of all the property of the company, to keep and preserve the same, subject to the control, order and direction of the court, with power and authority to manage and operate the

said railroad, to receive and disburse the income, the disbursements to be confined to the expense of running the road." In the first case the sweeping power is given "to conduct and carry on the business of the company, and in the latter the power is somewhat limited in the matter of expenditures of income. Every essential feature of a receivership was created by the order of July 2d, 1872, and the office ought to have been so called, and to be treated so now after the property has been, at the instance of the creditors, held for eight years in the same way as if it had been in name as it was in substance, a receivership. Fifty-four Bonds case, ante 304.

Having come to the conclusion that the property of the Greenville and Columbia Railroad Company has been in the hands of receivers since the order of July 2d, 1872, and the road operated by the receivers, it remains to determine what are the liabilities of the receivers.

The railroad company was a common carrier, and, as if in anticipation of events which have come to pass, the charter of the company, (A. A. Stat. 1845, p. 328, § 13,) provided for the right to let or farm out to others the right of transportation of person, produce, etc., and that the company, in the exercise of this right, and the persons to whom this right of conveyance and transportation should be let, shall, in so far as they act on the same, be regarded as "common carriers." It would be an easy way to defeat the wise purposes of the legislature if, on the application of a mortgage creditor, the railroad and all the important and valuable franchises of the company could be put, by an order in chancery, in the hands of a receiver, who could, for years, as in the case before the court, conduct the operations of the railroad, and enjoy the franchises of the company, entrusted to it on considerations of an enlightened public policy and escape the responsibilities of the common carrier. The convenience of transportation of persons and property, secured by this responsibility, constituted in large measure the inducement to the legislature to exercise the right of eminent domain, and transfer to railroad companies valuable franchises, and in some cases against their will, the property of private citizens. The current of opinion seems to be very decidedly in favor of the view that receivers are common carriers. It is said in High on Rec., § 398: "Receivers in possession of, and operating a railroad under appointment of a Court of Equity, may be held liable as common carriers for negligence in the performance of their duties." In Jones on Rail. Sec., § 511, we find these words: "But considerations of public policy may likely lead to the adoption of the rule that a receiver shall not be allowed to exercise the rights and powers of a common carrier without being also held subject to a common carrier's duties and liabilities." And this we hold to be the better doctrine.

The case of *Davenport v. Railroad Company*, 2 Wood, 519, was one for the recovery of damages for a personal injury, and in it Judge Wood says: "It was regarded as too clear for argument that if the road had been run by the president and directors when the injury was sustained, such a claim could not possibly have priority; but the receivers act merely in place of the president and directors, except so far only as the court may otherwise direct." In one sense the receiver does so act, but in another sense, especially in that sense which is important in these issue, he does not so act. The receivership is the transfer of the property to a new owner, who begins his work cut off from the past, with new duties and new obligations. The court could order a sale at once and let new and absolute owners take the property and assume their proper liabilities to third parties. If, instead of doing this, a receiver is appointed, he represents, technically, the interests of an insolvent corporation, but technically and substantially the interests of creditors, who ought not to be allowed to enjoy the franchises and property of the corporation without its responsibilities.

The intimation is given by Chief Justice Waite, in *Fosdick v. Schall*, 9 Otto, 254, that cases may arise in which it would be proper to apply a part of the proceeds of the sale of the mortgaged property to the payment of expenses incurred during the receivership. While the opinion in that case throws a flood of light on the subject of the payment of the expenses of a receivership and the mode of these payments, as well as the general relations of all creditors to the income, there is nothing in the case specially applicable here, as in the view taken by this court there is a fund arising from the income during the time the property has been under the control of the court, in the hands of its appointees, out of which can be paid the claims of petitioners.

Under the order of July 2d, 1872, the president and directors were instructed "to conduct and carry on the business of the company." This is language certainly broad enough to authorize the payment for losses and damages usually paid for by a railroad company, if any order on the subject was necessary. If there has been a receivership of this railroad since July 2d, 1872, and receivers are common carriers, there can be no doubt of the liability of the receiver in all these cases.

In *Kinney v. Crocker*, 18 Wis. 74, it was held that a state court could entertain jurisdiction of an action against a receiver appointed by the United States Court for injury to the plaintiff in that case, from negligence of the employees. In *Mearns's Adm'rs v. Holbrook*, 20 Ohio St. 187, it was held that a receiver was liable for injury to an employee. These doctrines are, of themselves, in accord with the best reason and public policy, and sufficiently sustained by authority in cases where the whole field is new and comparatively unexplored.

If the receiver is liable, and there is nothing to show and no intimation that there was any personal fault so as to make him personally liable, the claims ought to be paid out of the fund in court. No question of jurisdiction between two courts has arisen here as in most of the cases on this subject.

It is, therefore, adjudged and decreed that the decree of the circuit judge be reversed, and that the case be remanded to the circuit, that proper orders may be made for the payment of the claims of these petitioners, in accordance with the views herein expressed.

McIver, A. J., and Aldrich, A. A. J., concurred.

We propose in this note to review the law as to actions against receivers of railroads for injuries sustained during their management and control of the road. The subject is an interesting and intricate one and will require to be treated at some length.

It is now well settled that the receiver of a railroad in actual, exclusive possession, operating and managing the road, is liable in his official capacity for all injuries occasioned to passengers or others by the carelessness or negligence of the employees. The fact that he is a public agent, officer or trustee constitutes no defense. *Murphy v. Holbrook*, 20 Ohio St. 137; *Ohio & Miss. R. R. Co. v. Anderson*, 10 Ill. app. 311.

"Upon principle it would seem to be clear that no person can be permitted to exercise the rights and powers of a common carrier, especially when they embrace the franchises granted to a railroad corporation, except subject to the duties and liabilities of common carriers, whether the receiver is regarded as the officer of the law or the representative of the proprietors, of the corporation or its creditors, or as combining all these characters, he is entrusted with the powers of the corporation and must therefore be necessarily burdened with its duties and subject to its liabilities. There can be no such thing as an irresponsible power, exerting force or authority, without being subject to duty, under any system of laws framed to do justice. It is an inseparable condition of every grant of power by the state, whether expressed or not, that it shall be properly exercised, and that the grantee shall be liable for injuries resulting directly and exclusively from his negligence." *Klein v. Jewett*, 11 C. E. Green, 474.

A receiver in such case will therefore be held liable as a common carrier. *Blumenthal v. Brainerd*, 33 Vt. 402; *Morse v. Brainerd*, 41 Vt. 551; *Paige v. Smith*, 395.

He may also be sued by an administrator for causing the death of the plaintiff's intestate. *Murphy v. Holbrook*, 20 Ohio St. 137.

Inasmuch, however, as a receiver is an officer of the court and his possession is the possession of the court, it is generally held that no suit may be maintained against him, save with the consent and by the permission of the court appointing him. *Kennedy v. Railroad Co.*, 10 Reporter, 359.

It is contempt of the court to institute suit without first obtaining such consent, especially where the receiver is appointed by the United States court and the suit is in a state court. *Thompson v. Scott*, 3 Cent. L. J. 737.

In such case the proceedings in the suit will on application be set aside. *De Groot v. Jay*, 30 Barb. 483; *Taylor v. Baldwin*, 14 Abb. Pr. 166. A petition to the court for leave to sue must set out a prima facie cause of action. *Jordan v. Wells*, 3 Woods, 527.

Notice thereof must of course be given to the receiver but it is unnecessary to notify the parties to the suit in which the receiver has been appointed. *Potter v. Bunsell*, 20 Ohio St. 150.

The court in *Klein v. Jewett*, 26 N. J. Eq. 474, thus lays down the principle we have been considering:

"I think the rule may be considered settled that where an injury results from the fault or misconduct of a receiver, appointed by a Court of Equity, while acting under color of the authority of the court—there being no dispute as to the power of the court to make the order under which he claims to have acted—the court may in its discretion either take cognizance of the question of the receiver's liability and determine it or permit the aggrieved party to sue at law. But if the power of the court is disputed, the court then has no choice; it must assume exclusive jurisdiction and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal. Any other course when its jurisdiction is assailed would be an abandonment by the court of both its power and dignity."

It is said that the court appointing the receiver may determine the justice of the claim by reference to a master, by permitting a suit at law or by granting an issue at its option. *Barton v. Barbour*, 3 Morrison's Tr. 351; S. C. 4 Am. & Eng. R. R. Cas. 1; *Kennedy v. Railroad Co.*, 10 Rep. 359. It is difficult, however, to conceive how a court of equity could take cognizance of a claim for unliquidated damages for a tort. It has no machinery fitted to determine such a question: far more reasonable is the suggestion in *Wabash Railroad Co. v. Brown*, 5 Brad. (Ill. app.) 590, that the plaintiff should be allowed to recover his judgment at law and then should be at liberty to file a bill to enforce said judgment.

Where trustees or mortgagees have taken possession of a railroad and are operating it, they will be held personally liable as common carriers. *Rogers v. Wheeler*, 43 N. Y. 598, and also for any injury sustained by reason of the neglect or misconduct of a servant in their employ. *Sprague v. Smith*, 29 Vt. 421; *Ballou v. Farnum*, 9 Allen, 47; *Cooley v. Brainerd*, 38 Vt. 894.

Such persons have no shield of official capacity to hold over them. The law is somewhat different with regard to receivers.

A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct, but for the neglect or misconduct of those employed by him in the performance of the duties of his office, he is liable only in an action brought against him as receiver, and any judgment recovered therein must be made payable out of funds in his hands as such receiver. *Camp v. Barney*, 4 Hun. 273. See also *Newell v. Smith*, 49 Vt. 255; *Ruck v. Williams*, 8 H. & N. 308.

The distinction is an important one and the fact that the fund out of which a judgment recovered against a receiver in his official capacity is to be satisfied is the fund in his hands as receiver, and not his individual property, is pointed out in many cases. *Murphy v. Holbrook*, 20 Ohio St. 137; *Commonwealth v. Runk*, 26 Pa. St. 285; *Kain v. Smith*, 80 N. Y. 458; *Cowdrey v. Galveston, H. & H. R. Co.*, 3 Otto, 352.

Where by mistake a judgment is entered against a receiver in his personal capacity when it should be against him as receiver only, said judgment may be amended. *Camp v. Barney*, 4 Hun. 373.

Where the claim does not sound in tort the proper practice is for the person having the demand to bring it into the court appointing the receiver, and the court will direct him to be examined *pro interesse suo* before the master, and if upon auditing his claim the court finds it to be just one, it will direct the receiver to pay it without litigation, but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it against the receiver before some competent court—consulting thereon the convenience of parties and exercising a judicial discretion. *Thompson v. Scott*, 3 Cent. L. J. 737.

A few cases take a wholly different view of this subject, holding that

it is not necessary to obtain the leave of the court before suing the receiver. *Allen v. Central R. R. Co.*, 42 Iowa, 633.

It has even been held that a receiver appointed by the United States court may be sued in a state court, without the permission of the United States court first had and obtained. *Kinney v. Crocker*, 18 Wisc. 74.

The receiver may of course apply to the court appointing him for an injunction to restrain the plaintiff from prosecuting his suit. If he fails to do this, however, the suit will continue as though permission to institute it had been granted. *Camp v. Barney*, 4 Hun. 373; *Kinney v. Crocker*, 18 Wisc. 74.

Suits against receivers are of course regulated by the same principles as suits against railroad companies. *Potter v. Bunsell*, 20 Ohio St. 150. A recovery cannot therefore be had by an employee for injuries sustained through the negligence of a co-employee. If the court appointing the receiver has improvidently granted leave to bring such suit, it will revoke its permission. *Henderson v. Walker*, 55 Ga. 481.

Where the receiver has actual knowledge of a defect in the machinery and equipment of the road and an injury occurs in consequence, he will be held personally liable. *Erwin v. Davenport*, 9 Tenn. 44.

But where he holds himself out to the public in no other capacity than receiver, he is not liable for an injury caused by the negligence of a servant, where there has been no negligence on his part in the selection of the servant. *Cardot v. Barney*, 68 N. Y. 281.

A receiver must be acting strictly as such in order to secure to himself exemption from personal liability. If he be acting by virtue of a contract sanctioned by the court and outside of the court's jurisdiction he will be held personally liable like a trustee or mortgagee in possession. *Kain v. Smith*, 80 N. Y. 458; S. C. 2 Am. & Eng. R. R. Cas. 545.

As to costs in actions against receivers, see *Devendorf v. Dickinson*, 21 How. Pr. 275. And see *passim* as to such actions. *Albett v. Jewett*, 25 Hun. 608.

In determining the jurisdiction of the United States Courts in actions against receivers the personal citizenship of the receiver is alone taken into consideration and it will make no difference that the plaintiff is a citizen of the identical state by the courts of which the receiver was appointed. *Davies v. Lathrop*, 12 Fed. Rep. 333.

As a general rule where a receiver has exclusive control of a railroad, the company is not liable for injuries occurring thereon. *Ohio & Miss. R. R. Co. v. Anderson*, 10 Brad. (Ill. app.) 311.

If, however, the company allows the tickets to be printed in its name and otherwise holds itself out to the public as operating the road it will be liable for injuries occasioned to one who did not know of the receiver's appointment. *Railroad Co. v. Brown*, 17 Wall. 445.

In Indiana and Kansas it is held that the appointment of a receiver and the assumption by him of exclusive control does not exempt the railroad company from liability. *Ohio & Miss. R. R. Co. v. Fitch*, 20 Ind. 498; *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277; *Kansas Pacific R. R. Co. v. Wood*, 6 Am. & Eng. R. R. Cas. 582.

The owner of a locomotive engine may bring replevin for it against a railroad corporation in the hands of a receiver without obtaining leave of the court, where the corporation has no interest in such engine. *Hills v. Parker*, 111 Mass. 508.

IN RE FIFTY-FOUR FIRST MORTGAGE BONDS.

GIBBES v. GREENVILLE AND COLUMBIA R. R. Co.

STATE, EX RELATIONE ATTORNEY-GENERAL v. SAME.

(15 *Shand's (S. Car.) Reports*, 304.)

Under action pending in the name of the state for the foreclosure of a mortgage upon the property of a railroad corporation, and the appointment of a receiver, and on the motion of the Attorney-General for such appointment, an order was passed by the court in the words following: "As the state cannot be required to give security as other plaintiffs, it is ordered, that the president and directors of the Greenville and Columbia Railroad Company, under the order of and subject to this court, continue in the possession and management of the property of all kinds of the said company; and in like manner continue to conduct and carry on the business of the said company; that they make report to this court, at such times as this court may require, of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation." *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business, as officers of the court and not of the company. SIMPSON, C. J., dissenting.

A referee in the cause reported \$241,000 of this company's past-due bonds, secured by the lien of a first mortgage, as still outstanding, to which finding no exceptions were taken, and the report was approved by the Circuit Court. After the appointment of the receivers, fifty-four of these first mortgage bonds were purchased by these officers—some before the report of the referee, and some afterwards, but all before the approval of the report—and entered upon the books of the corporation as investments, and not as paid, and for several years reported to the company as still outstanding, and they were then re-issued for value. *Held*, that these fifty-four bonds had not been paid, and in the hands of their purchasers were secured by the lien of the first mortgage. SIMPSON, C. J., dissenting.

Appeal from a decree rendered in term time dismissed—a copy of the exceptions not having been furnished to the trial judge within ten days after the rising of the court. *Ex parte* Clyde, 14 S. C. 885, recognized and followed.

Before HUDSON, J., Richland, July, 1880.

Hon. A. P. Aldrich, judge of the Second Judicial Circuit, sat at the hearing of this appeal in the place of Associate Justice McGowan, who had been of counsel.

This case involves a contest between creditors of the Greenville and Columbia Railroad Company. It is therefore a branch of the parent case reported 13 S. C. 228, but raises points not there considered.

On May 6th, 1872, James S. Gibbes and other creditors of the Greenville and Columbia Railroad Company, filed their complaint

against this corporation and other defendants, praying that the rank and lien of the several mortgages on the property of the company be declared, and the order fixed in which they should be paid, and so forth. On June 11th, 1872, the Attorney-General of South Carolina filed his complaint in the name of "The State of South Carolina by the Attorney-General," against this same corporation, and others, its creditors, praying that the rights of the State under an act of the general assembly be declared and its interests protected, a mortgage held by the state be foreclosed, a receiver appointed, and suing and judgment creditors be enjoined, etc.

On June 18th, 1872, Judge Melton, on motion of the Attorney-General for the appointment of a receiver, and by consent of other counsel, filed his order, wherein he restrained creditors from suing, or enforcing their judgments, appointed John S. Green referee to call in creditors "to make proof before him of their several and respective claims," and to "take testimony as to the liens set up against the said company, their order of priority, and the amounts respectively secured by such liens," and to make report to the court. The order further provided: "As the State cannot be required to give security as other plaintiffs, it is ordered that the president and directors of the Greenville and Columbia Railroad Company, under the order of, and subject to this court, continue in the possession and management of the property of all kinds of the said company, and in like manner continue to conduct and carry on the business of the said company; that they make report to this court, at such times as this court may require, of the condition of the property of all kinds, of the said company, of its earnings, and profits, and expenditures, to the end that such orders may, from time to time, be moved for as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation."

On November 15th, 1872, Mr. Green, the referee, reported, *inter alia*: "1st. First mortgage bonds—Furman, trustee. Outstanding, \$241,000." To this part of the referee's report there was no exception taken by parties then before the court, or afterwards brought in by amended pleadings.

On May 13th, 1878, Judge Shaw passed an order directing that the substituted trustees of the first and second mortgages, be made parties, with leave to them "to file exceptions to the reports of the referees in the above-entitled cases." Amended complaints were filed in both cases in August, 1878, and they both alleged that there were still outstanding "\$241,000 of first mortgage bonds." W. A. Clark, substituted trustee of the second mortgage, answered the amended complaint of Gibbes and others, but did not deny this allegation. He also excepted to the report of Referee Green, but not to the number of outstanding first mortgage bonds. This was in August, 1878.

The order of Judge Pressley, of November 23d, 1878, appointing a receiver, is substantially stated in the opinion. He considered that the order of Judge Melton made the president and directors of the company "officers of this court and responsible to it in the character of receivers." Judge Pressley's decree bears date September 6th, 1879. He says: "The report of the referee shows that holders of \$241,000 of first mortgage bonds did not exchange them for those authorized by this act." He finds as a conclusion of fact: "4. After payment of said debts, the first mortgage bonds outstanding, and those held by the state, with all unpaid interest thereon, are the first lien on said property." He directs further inquiry as to the amount of several classes of bonds, but none as to the amount of outstanding first mortgage bonds. (The full decree may be read, if desired, in 13 S. C. at page 229.) This decree was affirmed on appeal, but the points involved here were not embraced in the exceptions there taken.

On November 29th, 1879, Judge Mackey passed an order directing the sale of the road on April 15th, 1880; and one other order referring it to N. B. Barnwell, the master of the court, to call upon the bondholders of this company, including those secured by the first mortgage, to produce their bonds and "make proof of the same, and of the amount of principal and interest due on the same," and that the master classify the bonds so proved in the following classes: 1. First mortgage bonds "not exchanged for bonds guaranteed by the State and now outstanding in the hands of persons holding the same."

In the matter of a claim for counsel fees, Judge Mackey passed a third order in this cause, in which, inter alia, "1. It is adjudged that the order passed by Judge Melton, in the case of State, ex rel. the Attorney-General, against the Greenville and Columbia Railroad Company, on the 18th day of June, 1872, did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property."

At a reference held before Mr. Barnwell, Master, under Judge Mackey's order, the National Bank of Greenville, William Knobloch, T. J. Robertson and others, produced first mortgage bonds, fifty-four in number, which, it was conceded, were included in Referee Green's "\$241,000 first mortgage bonds outstanding;" but they were objected to by other creditors, holding securities of an inferior lien, upon the ground that they were paid. The facts were that these bonds all fell due July 1st, 1863, and March 1st, 1864, were purchased with funds of the company by its treasurer, under directions of the president, between March 7th, 1872, and January 6th, 1874, and re-issued in October, 1875, and in January, 1877, as collateral security for loans made to operate the road, or sold for the same purpose. "These bonds were purchased just as other securities were purchased, and were entered upon the books

of the company as investments; we were not prepared to retire any bonds," is the testimony of the treasurer. From April, 1874, to May, 1878, inclusive, these bonds were reported in the treasurer's annual report as outstanding.

The master, by his report of May 10th, 1880 (upon the matters involved, fully stated in the opinion), found that these fifty-four bonds were not entitled to the lien of the first mortgage. Upon exceptions by the holders of these bonds to this report, Judge Hudson filed his decree in open court July 27th, 1880, by which the master's report was confirmed, except in a particular not considered by this court.

The holders of these bonds served the following exceptions:

1. For that his Honor held that the status of the fifty-four bonds was not *res judicata*.

2. For that his Honor held that the action of the railroad company, in taking up and re-issuing said bonds, extinguished their lien, notwithstanding the provisions of the act of January 28th, 1861.

3. For that his Honor held that the said bonds were not entitled equitably to rank with the guaranteed bonds.

4. For that his Honor held that neither the status of the president and directors of the railroad company, resulting from the order of June 18th, 1872, nor their intention in taking up said bonds *pendente lite*, prevented the usual effect of such bonds being taken up by an obligor and mortgagor.

5. For that his Honor overruled the exceptions made by these exceptants to the report of the master, submitted on May 10th, 1880, in relation to the fifty-four bonds, of which those proven by exceptants formed a part.

6. For that his Honor did not hold that, under all the circumstances of the case, the holders of the fifty-four bonds were, in the marshaling of securities for the purpose of distribution of the assets of the railroad company, equitably entitled to the position of bona fide holders for value, without notice of defects.

Notices of appeal and these exceptions were duly served and furnished. Mr. Fisher, receiver, also appealed upon a ground which it was unnecessary for this court to consider under the conclusions reached by them, but he failed to serve the presiding judge with copies of his notice and exceptions within ten days after the rising of the court.

Mr. J. P. K. Bryan, for National Bank of Greenville, appellant.

The question of the validity of these bonds is *res adjudicata*. 1 Rich. Eq. 1; 12 Rich. Eq. 138; 7 S. C. 134; 14 S. C. 225. The individual bondholders are bound, as their trustees were parties to the cause. 3 Otto, 160; 10 Otto, 611. A court of equity will keep an encumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention

of the parties. 18 Ves. 384; 6 Johns. Ch. 423. But the company never paid these bonds—they were taken up by the receivers. The president and directors, by Judge Melton's order, were made receivers. High on Receivers, § 184; Kerr on Receivers, 136, 169, 170; 20 Beav. 349, 54 Barb. 216. As receivers, these officers were not the legal representatives of the corporation. Kerr on Receivers 2, 168, 196, 206; 7 How. 331, and particularly *Whitley v. Lowe*, 25 Beav. 431.

Mr. J. H. Rion, for T. J. Robertson, appellant.

Mr. James Simons, for William Knobloch, appellant.

Mr. D. T. Corbin, for J. H. Fisher, receiver, appellant.

Mr. S. W. Melton, for W. A. Clark, trustee, respondent.

Purchase by a debtor of his own obligation with his own funds, and payment of such obligation, are convertible terms. Byles on Bills, 54; 2 Pars. on Cont. 715; 4 Wels., H. & G. 13; 2 Bail. 203; Dan. on Neg. Inst., § 1285. The extinguishment of the debt extinguishes the mortgage; re-issuing the debt cannot revive the mortgage as against intervening encumbrances. 10 Rich. Eq. 487; 2 Jones on Mort., §§ 889-948; Herm. on Mort., § 173; 6 N. Y. 449; 5 Cow. 671; 20 N. Y. 395; 2 Allen, 118; 3 Id. 339; 3 Metc. 55; 33 N. H. 432; 15 Vt. 374. The necessary conditions of *res adjudicata* do not exist. 7 T. R. 56; 3 Cl. & F. 510; 114 E. C. L. 255. This question was never considered. These officers were never appointed receivers—they were merely permitted to retain possession for the company. Why was not the word "receiver" used? If receivers, where is their authority to purchase and sell bonds? The holders are clearly not bona fide holders without notice, for the bonds were past due and dishonored. 50 N. Y. 158; 8 S. C. 305.

June 29th, 1881. The opinion of the court was delivered by

ALDRICH, A. A. J. Other branches of these causes have been before this court. I have not had the benefit of the argument therein, but proceed to present the questions submitted as they appear to me at the present hearing.

June 18th, 1872, Judge Melton made an order on a motion to appoint a receiver.

1. Restraining creditors of the Greenville and Columbia Railroad Company from instituting writs, and judgment creditors from enforcing their judgments.

2. That the president and directors of the company, "under the order and subject to this court," continue in possession and conduct and carry on the business of the company, and "make report to this court at such times as the court may require of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for as may be necessary and proper

for the protection of the property of the said company and the interest of all parties concerned pending litigation."

3. That Mr. Green be appointed referee, to call in, by advertisements in the newspapers, the creditors of the company, "to take testimony as to the liens set up against the said company, and the amounts respectively secured by such liens."

Under this order Mr. Green held references and submitted his report, dated November 15th, 1872. In this report he classifies the priority of liens as follows:

1. First mortgage bonds outstanding, \$241,000.
2. Guaranteed bonds outstanding, \$1,419,071.55.
3. Second mortgage bonds outstanding, \$1,200,000.

June 11th, 1872, Mr. Attorney-General Chamberlain filed a complaint on the part of the state, in which he prays "that a receiver be appointed of all the property, assets and effects of the defendants, to hold and keep the same subject to the further order of this court."

May 13th, 1878, Judge Shaw filed an order to amend the complaint by making H. H. De Leon, trustee, a party, which was done August, 1878.

November 23d, 1878, Judge Pressley, after hearing argument in the cases, as amended, filed a judgment, in which he says: "I consider that the said order of Judge Melton," (June 18th, 1872,) "did make the officers of the Greenville and Columbia R. R. Co. officers of this court and responsible to it in the character of receivers, but they have not executed the proper bond nor have they filed their accounts or performed the other duties required by that order. It is, therefore, incumbent upon me to put an end to that condition of the property, and to place it more substantially in the hands and under the custody and order of this court." He appoints Mr. Conner receiver.

September 6th, 1879, Judge Pressley filed his decree, holding "that the statutory liens, under the acts of 1861, 1866 and 1869, were securities for the payment of the bonds therein authorized, not mere indemnities to the state, and, therefore, it had no right to waive them in favor of the second mortgage." From this decree there was an appeal by De Leon, trustee, and Clark, trustee, but no exception was taken to that portion of the order of November 23, 1878, which adjudged that the order of Judge Melton, June 18th, 1872, "did make the officers of the Greenville and Columbia R. R. Co. officers of this court, and responsible to it in the character of receivers."

March 24th, 1880, this court, Mr. Justice McGowan delivering the opinion, dismissed the appeal and affirmed the circuit decree.

November 29th, 1879, Judge Mackey made an order for the sale of the road; and, on the same day, filed another order di-

recting holders of bonds to make proof of the same before the master, who is directed to "classify the bonds guaranteed by the state."

December 19, 1879, Judge Mackey filed his decree, in which he decides: "It is adjudged that the order of Judge Melton, June 18th, 1872, did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property," etc.

Auditor Manson testifies: "It was not the intention of Mr. Magrath to pay these bonds; we were not prepared to retire any bonds; these bonds were entered as an actual investment in company's books, and were purchased as any other securities were purchased by the company as an investment of company funds; these bonds were used for the purpose of raising money to operate the road by pledging them as collaterals for loans."

He also proves that from 1874 to 1878, the \$241,000 of first mortgage bonds were reported to the company as "first mortgage bonds then outstanding."

The note to Knobeloch for \$9000, and the two notes to the National Bank of Greenville for \$5000 each, are secured by "first mortgage bonds past due."

Mr. Barnwell, master, reports upon the testimony: "These fifty-four bonds are not entitled to the security of the mortgage to C. M. Furman, and they are not, in the hands of the present holder, first mortgage bonds of the Greenville and Columbia R. R. Co." He also reports: "These bonds having been proven before John S. Green, in 1872, a referee in one of these cases, their validity cannot now be questioned. As to this view, it only applies as a matter of fact to a portion of them; as a matter of law, I feel called upon by the order of this court to treat all bonds as unproved until they are submitted to me and are proved before me, to my satisfaction, to be what they purport to be. I have, therefore, passed on these bonds as I have done on all others, without regard to whether or not they had been passed upon by Referee J. S. Green. It is also claimed for them that in fact a great many of these bonds were not reissued by the company, but by a receiver of this court. As I am fully of the opinion that there was no receiver of this road until the appointment of James Conner as receiver," etc.

To this report exceptions were filed on the part of Knobeloch, Palmer, Robertson, and National Bank of Greenville.

July 27th, 1880, Judge Hudson filed his decree, in which he overrules the exceptions, except those of the National Bank of Greenville. From this decree the cause now comes to this court on appeal.

The railroad interest, although in its infancy, has attained such vast proportions, commercial, financial and, I may add, political,

that it becomes us to proceed with great caution in prescribing the rules of law by which these corporations are to be governed. The questions constantly arising are of such novel aspect that it can hardly be said any fixed rules of construction have yet been established. By combinations and skillful management they have acquired an influence that seriously affects the interest of society in all its relations. This court cannot legislate, but in giving construction to the acts of the legislature granting charters and privileges, it will be careful to adopt such rules as will most effectually guard the public from imposition, while it preserves the chartered rights of the corporations. In the interest of society a vast power has been concentrated in these enterprises; the right of eminent domain has been invoked in their behalf, and it becomes us to see, that while all their just and chartered rights are preserved, the public shall not be damaged.

Two questions arise here:

First. The proper construction of the order of Judge Melton of June 18th, 1872.

Second. When these fifty-four bonds were taken up by President Magrath, was it with the intent to retire them, or was it for the purpose of an investment, to afford him negotiable securities by which he could hold in hand the current earnings of the road to meet its current expenses?

Judge Melton's order was passed on a motion for a receiver. It provides that the president and directors, "under the order and subject to this court," shall continue in possession of the road; conduct and carry on its business; make a report to the court of its condition, earnings, profits and expenditures. It appoints a referee to report the order and priority of the liens against the company, and restrains judgment and suing creditors. Now if this order did not make the president and directors receivers, for what purpose was it made?

It will be remembered that on June 11th, 1872, Mr. Chamberlain, then attorney-general, filed his complaint praying: "That a receiver be appointed of all the property, assets and effects of the defendants, to hold and keep the same subject to the further order of this court." Seven days after, Judge Melton filed his order of June 18th, 1872. Was not that in response to the prayer of the complaint filed by the Attorney-General on the part of the state? Did it not invest the president and directors with all the attributes of a receiver? We need be at no loss to determine who is a receiver since *Gadden v. Whaley*, 14 S. C. 210. Mr. Justice McGowan, after reviewing all the authorities, happily defines him as "an executive officer of the court, to administer the assets of the estate under the direction of the court, which may, for the purpose of preserving the property, restrain the executor from intermeddling with the management of the estate and compel him to give

up the control of it to the receiver; but such appointment and administration do not remove the executor or administrator or destroy his character as the legal representative of the estate. The authority of a receiver rests only in the orders of the court by which he is appointed. By virtue of any general authority as receiver he has no right to sue or be sued or defend." Now here were the president and directors of this road, on a prayer to appoint a receiver, directed to take charge of the property, manage it, report its earnings and expenditures, a referee appointed to call in creditors and report the priority of liens, and creditors suing and judgment restrained. From this order there was no appeal; it stood as the judgment of the court from 1872 to 1878. On November 23d, 1878, Judge Pressley filed a judgment, in which he said: "I consider that the order of Judge Melton made the officers of the Greenville and Columbia R. R. Co. officers of the court and responsible thereto in the character of receivers." From this there was no appeal. Then Judge Mackey, December 19th, 1879, filed his decree, in which he said: "It is adjudged that the order of Judge Melton did constitute the officers of the company the receivers of this court for the operation of the road and the protection of the defendant's property." From this there was no appeal. Nor do we hear their character as receivers questioned until the coming in of the report, May 10th, 1880, in which Mr. Barnwell, the master, reports there was no receiver until the appointment of Mr. Conner. Judge Hudson does not pass on this question, as he holds that whether receivers or officers of the company, the purchasers of past-due obligations can only rank as holders of unsecured bonds. I have not drawn on the wealth of authority contained in the arguments of the distinguished counsel who have presented these cases; that would extend this opinion unnecessarily, and the references will be found in the report. We conclude, therefore, and so adjudge, that the order of Judge Melton, June 18, 1872, appointed the president and directors of the company receivers of the court.

Which brings us to the second inquiry. When these fifty-four bonds were "taken up," was it payment, and when reissued were they deprived of the protection of the original security? This is a question of right and intent. It may well be questioned, if, under the order of the court appointing the president and directors receivers, they had authority to pay and retire the bonds secured by the first mortgage. They were required to carry on the business of the company—make report of its condition, earnings, profits and expenditures—for what purpose? That the court may make such orders as may be moved for, to protect the property and the interest of all parties concerned. The court was as anxious to preserve the liens and securities of the bondholders and other creditors as it was to preserve the property of the company which

protected them. It was not to create dispute and litigation, for, to prevent this, creditors of all classes were enjoined. The receiver is the officer of the court, as Mr. Justice McGowan emphatically says, "its hand," to manage the property under the direction of the court for the best interest of all concerned. No preferences are to be shown, no practices tolerated that will give advantage to one class of creditors to the detriment of another class, but the whole business to be managed on the basis of the broadest equity. Hence large discretion is allowed him in the financial manipulation of the assets; he may call in or put out the securities of the company as, in his judgment, will best enable him to secure the property to the stockholders and pay off its creditors, subject always to the check of the court. If, in doing this, he takes up bonds one month and re-issue them the next, to save interest and enable him to meet the current expenses on the most economical scale, I do not see that he thereby destroys the lien of the bond taken up, which made it a secure investment when originally issued, and which is supposed to retain its lien as it passes from hand to hand around the financial circle. To assume this would not only create distrust but destroy the credit of the road, for it cannot be supposed that capitalists will lend money on collaterals the validity of which involved constant legal investigation. If he is "the hand of the court," where does he derive his authority to pay a bond, cancel and then reissue it deprived of the protection of the original mortgage by which it was made valuable and negotiable? I see nothing in the order to confer such a power. It appears to me to be a most extraordinary proposition that where a receiver is appointed to protect creditors and property he will be permitted to destroy liens and make new debts on the faith of those very liens which he knows he has extinguished!

Now let us consider the condition of things when the receiver took charge of the property under the order of Judge Melton in 1872. The referee, Mr. Green, reports \$241,000 (of which these fifty-four bonds were a part) as "first mortgage bonds outstanding." This report is not excepted to and becomes a part of the record. These bonds are annually described, for a series of years, in the reports of the company as bonds thus renewed. Mr. Manson, the auditor, says: "It was not the intention of Mr. Magrath to pay these bonds; we were not prepared to retire any bonds; these bonds were entered as an actual investment in company's books, and were purchased as any other securities were purchased by the company as an investment of company funds; these bonds were used for the purpose of raising money to operate the road by pledging them as collaterals for loans." How, then, can it be said this was payment, and debtor and creditor uniting in the same person, the lien of the mortgage was lost? That is not all. Mr. Magrath was not examined, but his acts speak with great emphasis.

He not only published the bonds in his annual reports, which were distributed, "as first mortgage bonds then outstanding," but he actually incorporated in his notes to Knobeloch and the National Bank of Greenville a description of them as "first mortgage bonds past due." After this there was no use to examine Mr. Magrath to say with what intent he took up and re-issued the bonds. If he did not intend to give them the character of first mortgage bonds he was practicing a hideous fraud on the men who advanced their money on the faith of that security. And it is equally extravagant to suppose that any man of ordinary business sagacity would advance his money to a corporation threatened with bankruptcy, in the hands of a receiver, unless he supposed he was protected by the first mortgage. Further yet: Judge Pressley, in September, 1879, held "that the statutory liens were securities, not mere indemnities to the state, and, therefore, it had no right to waive them in favor of the second mortgage." From this judgment there was an appeal, which was dismissed. Judge Mackey held that the order of Judge Melton did appoint the president and directors receivers, from which there was no appeal. He ordered the master, Mr. Barnwell, to classify the bonds guaranteed by the state. What bonds? The bonds reported as "first mortgage bonds" by Referee Green—the bonds decided to be first mortgage by himself and Judge Pressley. Is not the question *res judicata*? And yet, when the master comes to classify the bonds, what does he do? He overrules Judges Mackey and Pressley, treats Referee Green's report with indifference, and actually holds, in face of the adjudications of Judges Pressley and Mackey, that there was no receiver of the road until the appointment of Mr. Conner. Instead, therefore, of classifying the bonds in accordance with the decisions of the court by whom he was instructed, he rules them out as not entitled to the protection of the first mortgage. The act of 1861 provides that "the bonds thus taken up shall stand as security to the state, and thereby give the state the lien under the first mortgage, until all the bonds thus secured by mortgage shall be retired." As I have said, Mr. Magrath never intended to retire these bonds and deprive them of the protection of the first lien. If, then, he took them up, not to retire them, not to pay them, but as an investment to save interest and meet the current expenses of the road, when he re-issued them they went into the hands of the purchasers clothed with all the protection given them in their original and first issue.

After all the learning, instructive and interesting, that has been displayed, it does seem to me, from a careful consideration of the several reports, orders, declarations and judgments made herein, that this discussion is more of an intellectual gladiatorial contest on questions of law, arising since the commencement of the suit, than on the law applicable to the facts at the time of the transaction.

But at last the real question is, did President Magrath, who issued these bonds, and the capitalists who advanced their money on the security, regard them as first mortgage bonds? On this question we have no doubt they were so issued, so regarded, and are entitled to the protection which gave them value when put in the market. And it is adjudged that they are secured by the first mortgage. Let the decree be reformed in conformity to the principles herein announced.

Here is a motion also to dismiss the appeal of Mr. Fisher, receiver, because a copy of the exceptions was not served on the presiding judge within ten days. The points involved in the appeal having been fully argued by counsel, and the case decided, it is a matter of little consequence to the appellant, Fisher, what becomes of this motion. We have no doubt that Mr. Corbin, attorney for Mr. Fisher, agreeing to pay, and actually paying his proportion of the expenses in preparing the brief, and the cause being fully settled for argument, supposed he had done all that was necessary. But the rule is finally established in *Ex parte Clyde*, and cannot be departed from.

The appeal of Fisher, receiver, is dismissed.

MOLVER, A. J., concurred.

SIMPSON, C. J., dissenting. The majority of the court has reached the conclusion, in this case, that the bonds in question, upon their re-issue, retained the security of the mortgage by which they were secured in their first issue, and, this being the first mortgage, that therefore these bonds should rank as first mortgage bonds in the distribution of the assets of the company.

Being unable to concur in this opinion, I have dissented, and now propose to state briefly the reasons of my dissent.

The argument of the majority is, that the president and directors of the road became receivers under the order of Judge Melton, of June, 1872; that, as such receivers, they had the legal right to invest their receipts from the income of the road, in such securities as they saw proper; that these bonds were taken in by them as such investment; and being investments, the receivers had the right to reissue them afterward without disturbing the security of the first mortgage. This conclusion is based upon the position that these officers were receivers. Even if this was so, I do not see that it follows, necessarily, that they had the power to re-issue these bonds, with all their original incidents and surroundings, after once called in. But I am not satisfied that Judge Melton's order constituted these officers receivers in the strict sense of that term.

It is true that Judge Pressley thus construed this order upon the circuit, and so has Judge Mackey; and now a majority of the court has so construed it. In the face of the concurring opinion

of so many eminent jurists, of course I differ with great hesitation and doubt; but still I do differ, and I must follow my own judgment.

The question at issue is as to the intent of the order. Did Judge Melton intend to make these officers receivers?

The term "receiver" is a technical term, and has a well-defined legal meaning, and, when used in an order, carries with it a plain and well-understood signification. Besides this, the duties belonging to the office, which the term imports, are also well understood, so much so that the mere appointment of a party as receiver, when the term itself is used in the appointment, at once defines his duties without more. Such being the fact, it seems probable that had Judge Melton intended to divest the president and directors of this company of their powers as officials of the road and invest them with the new power of a receiver, he would have so ordered, in plain and unambiguous terms; he would not have left the matter to construction, but would have used the precise and apt words to that end. This seems so reasonable that his failure to do so can hardly be accounted for on the ground that it was accidental, or that it occurred from inadvertence. It is more reasonable to suppose that it was intentional.

I venture the assertion that no order can be found in the history of judicial proceedings in which a receiver has been appointed where this term has been omitted. No such term is used in this order, nor has there been employed any term equivalent to this. And, although the prominent prayer of the complaint was for the appointment of a receiver, this term seems to have been carefully avoided in the order. Besides, the order is defective in other particulars as an order constituting a receiver in a large and extensive insolvent corporation with millions of assets. No bond is demanded; no inventory of the property and assets required, and no assignment by the company of this property to these receivers is directed.

The order was a consent order, and my construction of it is that the parties agreed that the property, as a temporary arrangement, should be left under the control and management of the present officers of the company until the further hearing of the cause. In the meantime the creditors to be restrained from interfering with the running of the road—the appointing of a receiver to be left to some future stage of the proceedings. And this order was intended to carry out this assent and understanding of the parties.

This construction is sustained by the further fact that it is very unusual for the president and directors, as president and directors of an insolvent company, to be appointed receivers of the property and assets of the company pending the litigation. In fact, I doubt whether a case can be found where such officers, as individuals and by name, much less as company officials, have been appointed. Mr.

High is emphatic in his condemnation of such a practice. The president and directors of a company are officers of the company, elected or appointed by the company, and under its control. The appointment of such officials, in their official character, would be the same as appointing the defendant company itself. And I do not suppose that there ever has been an instance, unless this be one, where the defendant has been appointed the receiver of the property in litigation. High on Receivers, § 72.

But, admitting that this order of Judge Melton did constitute these company officials in their official capacity receivers, does it follow that they have the power to buy up the bonds of the company with company funds, and subsequently put them out again subject to the protection and security of such mortgage, if any, by which they were secured in their first issue?

It will be admitted, I suppose, without question, that no debtor could do this, whether he be an individual or a corporation, where the rights of other creditors are involved.

The application by a debtor of his own funds to his own debts, whether evidenced by notes or bonds, will inevitably extinguish the debt. There can be no such thing as a debtor being the assignee of his own indebtedness in such way as to keep his debt alive to himself against himself. In every contract there must be, at least, two parties.

True, either an individual or a corporation might reissue his negotiable notes or his bonds, although once taken up and extinguished, but this would be done, not by virtue of any life still existing in such instruments, but by virtue of a new vitality imparted by the new contract of reissue, and the paper would go forth the second time not as the old paper, but as an original instrument, discharged from all of its former incidents and accompanied with such only as the new contract might attach to it. No authority is needed to support this proposition; it springs from well-known elementary principles.

Now, apply this doctrine to the case at bar.

It is not claimed that the receivers used any other funds in the purchase of these bonds except company funds. Here, then, is the application of the debtor's money to the debtor's debts, not by the debtor's own act in person, it is true, but by the hands of another. This, however, can make no difference, as it is not the medium through which this application of the funds of the debtor is made which extinguishes the debt, but it is the fact that this money has been used.

Besides, could these receivers, had they kept possession of these bonds until final settlement, have presented them against this insolvent company as subsisting obligations and claimed the amount which their assignees are now doing, the full amount due thereon? Could they have instituted action against themselves to enforce

payment? They might have held them and obtained, on final settlement of their accounts, credit for the sum paid out by them, but no more. The bonds, while in their hands, were certainly extinct as against the company.

If this was so, even for a moment, was not the mortgage discharged to that extent? and, if discharged, who had the power of re-opening this mortgage and of reinstating these bonds at their full value to the prejudice of other creditors?

My opinion is that when these bonds were taken up by the funds of the debtor they were extinguished, and the mortgage was discharged to that extent.

And this, whether the order of 1872 constituted the president and directors receivers or not.

Decree reversed.

INDEX.

The mode of citation of the American and English railroad cases will be as follows:

9 Am. and Eng. R. R. Cas.

ACT OF GOD, 188.

See **CARRIER, 32.**

ADMISSION, 401, 413.

See **EVIDENCE, 18, 14; MASTER, SERVANT, 4.**

AGENT, 41, 55, 197, 392, 395.

See **ATTORNEY; CARRIER, 20; CONNECTING LINES, 18, 29.**

1. General freight agent has no power to fix rate of freight over connecting lines. His announcement of rate of freight is no guarantee to a shipper of goods on the connected line. *Hill v. Burlington, etc., R. R. Co.* 21.

2. As to service of process on local agent. *Houston and T. C. R. R. Co. v. Burke*, 59.

3. Court cannot instruct jury that an agent or servant of a party called as a witness has such interest as affects his testimony. *Marquette, etc., R. R. Co. v. Burke*, 85.

4. The declarations of an agent in charge of a station and warehouse belonging to defendant at the time plaintiff's goods were burned therein, as to what occasioned the fire, *held* under the circumstances inadmissible in evidence. *Meyer v. Virginia, etc., R. R. Co.*, 178.

5. Where there is no evidence that there is a general freight agent at a point, notice to a freight agent is sufficient notice of stoppage in transitu. *Poole v. Houston, etc., R. R. Co.* 197.

6. A principal is not liable in exemplary damages for the unauthorized malicious act of his agent unless he adopts and ratifies the act. *Galveston, etc., R. R. Co. v. Donahoe*, 287.

7. Negligence of the agent is negligence of the railroad company, and the company is liable therefor. *H. & T. C. R. R. Co. v. Rand*, 399.

8. In an action brought by K. against the M., K. & C. R. Co., for labor performed by M. for the company, it was shown that M. had a valid claim against the company for labor performed by him; that he sold the claim to K.; and that K. gave notice to H., who was agent for the company, and demanded that H. should pay the debt to him, K. The evidence introduced also tended to show that H. was in charge of the depot and business of the company at Parsons; that he was the only agent of the company stationed in Labette County, and that the company had no general office in Kansas except at Parsons, and also that H. paid the employees of the company. The evidence also tended to show that afterward H. paid the claim to M., instead of to K., *held*, that the evidence was sufficient to authorize the trial court to find, as it did, that H. was such an agent of the company that notice to him by K. of the purchase of the claim by K. from M. was a sufficient notice of such purchase to the company. *Memphis, etc., R. R. Co. v. Koch*, 429.

ANIMALS, 25, 259.

See **CARRIER**, 7; **PENALTY**, 8.

APPEAL, 469.

See **SEAL**.

On an appeal from the Appellate Court, in an action to recover damages for a personal injury from negligence or willful act of the defendant's servant, the facts will not be examined any further than may be necessary to an understanding of questions of law raised—as, for instance, the propriety of instructions based upon the evidence. The finding of the facts by the Appellate Court, in such case, is conclusive. *Wabash, etc., R. R. Co. v. Rector*, 264.

ASSIGNEE IN BANKRUPTCY, 118.

See **BANKRUPTCY**, 1, 2, 8.

ASSIGNMENT, 429.

See **AGENT**.

Where the assets of a railroad company are sold in bankruptcy, and the purchaser transfers them to another who arranges a new company, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old one. *Wilcox, Toledo, etc., R. R. Co.* 518.

ATTACHMENT.

See **GARNISHMENT**.

ATTORNEY, 469.

See **ATTORNEY-GENERAL—SEAL**.

An attorney acting through fraud, and with the intention of defrauding a third party, cannot deny his liability for loss sustained by his wrong act, under his privileges as an attorney at law. Nor can he deny his liability as an agent, for as such he is not justified in knowingly committing willful and premeditated fraud upon another. *Poole v. Houston and T. C. R. Co.* 197.

ATTORNEY-GENERAL.

1. The Attorney-General, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individual and private rights. *New York, v. Brooklyn, etc., R. R. Co.* 454.

2. Section 1108 of the General Laws of Colorado, limits the duties of the Attorney-General to State cases instituted or pending. His duty to appear in State cases in inferior courts would be obligatory only when required to do so by the Governor or General Assembly. *Atchison, etc., R. R. Co. v. People*, 542.

3. It is the duty of the district attorneys to appear in the district courts of their respective districts on behalf of the State. *Id.*

BAGGAGE.

See **SLEEPING CARS**.

1. Suit was instituted against the T. and P. Railway for baggage lost at some unknown point between M. and D., through checks for said baggage being delivered to plaintiff at M. by an agent of the M. and L. R. R., over three uniting lines, including the T. and P. Railway. *Held*, that the check delivered at M. was the check of appellant railroad, as well as of the other companies; that the contract was appellant's contract, and it was bound by it. *Texas and Pacific R. R. Co. v. Fort*, 392.

2. Where different railways, forming a continuous line, run their cars over the whole line and sell tickets for the whole route, and check baggage through, each carrier is the agent of all the others to accomplish and complete the carriage and delivery of the goods, and an action will lie against either carrier for the baggage lost. *Texas and Pacific R. R. Co. v. Ferguson*, 395.

3. The market value of the articles lost is deemed an ultimate compensation, and this is the proper measure of the right of recovery. *Id.*

BAGGAGE—Continued.

4. Damages cannot be recovered for expense incurred in making search for lost baggage. *Id.*

5. Articles not intended to be used on the passenger's trip, but being transported merely for future or prospective household use, is not considered baggage in that sense whereby the railway company would be liable for its loss, and a refusal of a charge asking such instruction to the jury was error. *Id.*

BANKRUPTCY.

1. A plea of the bankruptcy of the plaintiff and the transfer of his property and rights to an assignee after the commencement of the suit, in abatement of the action, without any prayer of any kind, is subject to demurrer. *Chicago & N. W. R. R. Co. v. Jenkins*, 113.

2. Under section 5047 of the Revised Statutes of the United States, the assignee, at any time after his appointment, has the right to be substituted as plaintiff, on his request, in an action pending in the name of the bankrupt for the recovery of a debt or other thing, which might or ought to pass to the assignee, who may thereafter prosecute the suit the same as if originally brought in his name, and such substitution will furnish a good replication to a plea in abatement of the plaintiff's bankruptcy. *Id.*

3. The bringing of a suit is the issuing of a summons or other process to bring the defendant into court. The substitution of the assignee of a bankrupt as plaintiff in a suit is not to be regarded as the commencement of the suit by the assignee, within the meaning of the United States statute limiting such actions to two years after the assignee's appointment. *Id.*

4. The statute of the United States limiting the bringing of suits by the assignee of a bankrupt within two years from the time of his appointment, was designed only to apply to suits brought by him, and not to actions already pending, in which he may be substituted as plaintiff, although such substitution may be more than two years after his appointment. *Id.*

5. Suit on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was endorsed the name of a person who added to his name the word "assignee." It was shown that the payee in the promise had been put in bankruptcy, and the endorser of the paper was assignee in bankruptcy thereof. *Held*, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee, would not be sustained on the final submission of the case. *Wilcox, Toledo, etc., R. R. Co.* 518.

6. Where the assets of a railroad company are sold in bankruptcy, and the purchaser of its assets transfers them to another who organizes a new company, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old company. *Id.*

BILL OF LADING, 25, 31, 30, 97, 103, 168, 235, 242, 331, 426.

See *CARRIER*, 17, 23, 27, 44, 46, 47, 55, 66.

CONNECTING LINES, 9, 12; PENALTY, 7.

1. The transfer of a bill of lading, whether absolute or by way of pledge, conveys to the transferee either a general or special property in the goods for which the bill is given of such a character that he is entitled to entertain an action of trover in case of the conversion of such goods. *Forbes v. Boston and Lowell R. R. Co.* 76.

2. Liability of carrier for misdelivery of goods to person not producing the bill of lading. *Forbes v. Fitchburg R. R. Co.* 80.

3. In shipping goods from Chicago to Boston the usual course of trade is to forward the goods by vessel on the Great Lakes as far as Buffalo, and from thence to transport them by rail to Boston. A bill of lading is given to the consignor at Chicago by the owners of the vessel, drawn to the consignor's order at Buffalo. At Buffalo, when the goods are put in the cars, the railroad company gives a memorandum receipt reciting that the vessel's bill of lading is still out-

BILL OF LADING—Continued.

standing, is to be regarded as transferring the property, and is alone to be used in procuring the goods from the railway company. Goods being forwarded in accordance with the above-mentioned course of trade, the vessel's bill of lading was transferred by the consignee, to whom it had been indorsed prior to the arrival of the goods in Boston. The goods, however, were delivered to the consignee by the railway company without demanding the bill of lading. In an action by the transferee of the bill against the company for the misdelivery, *held*, that said bill was not functus officio at Buffalo, but was effectual to transfer the property in the goods to plaintiff, and that therefore he was entitled to recover. *Id.*

4. When terms of bill of lading not construed to exempt carrier from liability for delay caused by his negligence. *McKinney v. Jewett*, 209.

5. Carriers must recognize transfers of bills of lading. *Wacker v. Detroit*, etc., R. R. Co. 251.

6. A. contracted with B. to sell and deliver to him at a certain railroad station a car load of wheat at a certain sum per bushel, payment to be made therefor on delivery of the wheat, B. representing that he had no cash for that purpose. The wheat was delivered, weighed, and put by A. in a car on the siding at the station. A. then asked B. for the money. B. replied that he had not the money, but he would have it with him next day. A. replied that B. could not have the wheat until it was paid for. B. assented and agreed to allow the wheat to remain where it was. Before payment B. obtained from the agent of the railroad a bill of lading for the wheat, which he sold for value to a bona fide purchaser without notice. The company subsequently threatened to deliver the wheat to the holder of the bill of lading, whereupon A. brought replevin. *Held*, that by the terms of the contract between A. and B. payment of the price was a condition precedent to the passage of the title and that therefore the ownership of the wheat continued to be vested in A. *Held*, further, that the issue of the bill of lading and the attempted sale of the wheat and assignment of the bill did not preclude plaintiff from recovering his property. *Evansville, etc., R. R. Co. v. Erwin*, 252.

BILLS AND NOTES, 598, 604.

See CONSTRUCTION, SUBSCRIPTION, 1 2.

BONDS.

A referee in the cause reported \$241,000 of this company's past-due bonds, secured by the lien of a first mortgage, as still outstanding, to which finding no exceptions were taken, and the report was approved by the Circuit Court. After the appointment of the receivers, fifty-four of these first mortgage bonds were purchased by these officers—some before the report of the referee, and some afterwards, but all before the approval of the report—and entered upon the books of the corporation as investments, and not as paid, and for several years reported to the company as still outstanding, and they were then re-issued for value. *Held*, that these fifty-four bonds had not been paid, and in the hands of their purchasers were secured by the lien of the first mortgage. *In re* 54 First Mortgage Bonds, 739.

CARRIERS, 165, 168, 392, 395.

See BAGGAGE, CONNECTING LINES, DISCRIMINATION, PENALTY, SLEEPING CARS.

1. Railroads, as public highways, created for public use, and subject to State jurisdiction, are handed over exclusively to corporate management and control, because it is for the best interests of the public that their functions should be performed for the State, as public trusts by corporate bodies; and the acceptance of such trusts on the part of the corporation makes it the agency of the State, whereby it contracts to accept to duty of carrying all persons and property, within the scope of its charter, as a public trust. The exclusive enjoyment of use to the corporation imposes the corporate duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner

CARRIERS—Continued.

and at such times as the public needs may require. *People v. N. Y. Central and H. R. R. Co.* 1.

2. The performance of such duty is compellable on behalf of the people, through the courts, by mandamus; and their Attorney-General is the proper officer to set the process in motion. The fact that injured individuals may have private remedies for damages sustained does not preclude the State from its remedy by mandamus, where there is a general or partial suspension of the duty of receiving or transporting freight affecting large numbers of people. *Id.*

3. Uncontroverted allegation, showing a quite general and largely injurious refusal and neglect of performance of the duties of carrier by a railroad company establishes a case for the interference of the State; and railroad corporations cannot refuse or neglect to perform their public duties pending a controversy with their employees over the cost and expense of doing them, where it does not appear that the employees committed any unlawful act, or that there was an illegal combination compelling them to stop working. *Id.*

4. The writ should simply require the corporation to resume the duties of carrier of the goods and property offered for transportation, and upon its return all questions, whether what had been done was a sufficient compliance with its command, would become a subject of further consideration. *Id.*

5. In an action against a carrier, when unreasonable delay is complained of, and the loss of a market is claimed, it is not sufficient for the plaintiff to prove delay, and also a damage, when it appears from his proofs that there was other delay not chargeable to the defendant; but some damage must be traced to the delay for which the defendant was in fault. *Detroit and Bay City R. R. Co. v. McKenzie*, 15.

6. When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration. *Id.*

7. As far as the route is concerned, the duty of a railroad as a carrier of live animals is the same as its duty as a carrier of goods. *Michigan Central R. Co. v. Myrick*, 25.

8. What constitutes a contract of carriage is a question of general law, in which this court will exercise its own judgment, and will not be bound by state decisions. *Id.*

9. Measure of damages where goods are unduly delayed in transit and are in consequence deteriorated. *Lindley v. Richmond, etc., R. R. Co.*, 81.

10. A carrier receiving goods from a tortious holder has no lien on them against the owner, but a carrier receiving goods from one who, by the owner's act, has been clothed with an apparent authority, has a lien on them against such owner. *Vaughan v. Providence, etc., R. R. Co.*, 41.

11. From considerations of public policy, common carriers are made liable under the statute (R. S., art. 278), and under the decisions of the courts of Texas, as at common law, for all losses not occasioned by the act of God or the public enemy; and any exceptions or special contract seeking to vary that liability are invalid. But if the shipper practises a fraud on the carrier by fraudulently concealing, either through his acts or omissions, the value of the article shipped, the carrier is discharged. *Houston and T. C. R. R. Co. v. Burke*, 59.

12. As to evidence and measure of damages where family portraits are lost by a carrier when in transit. *Id.*

13. A misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion which renders the bailee liable in an action of trover, without regard to the question of his due care or negligence. *Forbes v. Boston and Lowell R. R. Co.*, 76.

14. A in Chicago shipped certain goods to B in Boston, receiving a bill of lading by which the railroad company undertook to deliver the goods to B or order. B having received the bill of lading, indorsed it to C as a security for an advance and it was held by C when the goods arrived. As between B and C

CARRIERS—Continued.

it was agreed that B should pay the freight. The goods arrived in Boston on Oct. 30, and remained in the cars until Dec. 12. On that day B demanded them without producing the bill of lading, and the company finding by their way bill that he was the consignee, delivered said goods to him. The goods were afterward sent abroad and C subsequently brought trover against the railroad company for them. *Held*, that there had been no laches on the plaintiff's part and that under the principles above laid down he was entitled to recover. *Id.*

15. The plaintiff's measure of damages in the above case was the market value of the goods at the time of the conversion, less the freight, together with interest thereon. *Id.*

16. In a case which was in all other respects similar to the above, the bill of lading was drawn to B only and not to B's order. A custom was also proved on the part of all railroad companies terminating in Boston to deliver to the consignee all goods thus billed, relying upon the way bill without requiring the production of the bill of lading. *Held*, that under these circumstances C as transferee of the bill of lading was not entitled to recover in an action of trover against the railroad company. *Id.*

17. A railroad company transporting grain deposited the same in accordance with the custom of trade in a grain elevator at the point of destination, where it was mixed with other grain of like quality. Subsequently on demand it delivered to the consignee of such grain an equal quantity to that transported, but without demanding the bill of lading, which was drawn to the consignee's order. An indorsee of said bill prior to the arrival of the grain brought trover against the railway company for a misdelivery. *Held*, that the plaintiff was entitled to recover. *Forbes v. Fitchburg R. R. Co.*, 80.

18. One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order. *Marquette, etc., R. R. Co. v. Kirkwood*, 85.

19. A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them; he has ordinarily no means of opening packages and examining their contents and has nothing to do with previous dealings with the property by independent carriers. *Id.*

20. A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent. *Id.*

21. One who claims damages for negligence must prove the negligence; it cannot be presumed. *Id.*

22. A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him, or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods come into his charge, and until that is proved, the contract is not. *Id.*

23. F. & Co. delivered to the New Orleans, etc., R. R. Co. a certain number of cotton bales, to be transported between certain points on the line of that company's road. The cotton was put on flat, open cars, against the remonstrance of the consignors, and while in transitu was consumed by fire. Thereupon F. & Co. brought an action to recover damages for the loss sustained by them. The train which was carrying the cotton was made up of both box and flat-cars, and although both classes of cars contained cotton, none was burned except that on the flat-cars. The evidence did not show how the cotton was ignited. There was written across the face of the bill of lading these words: "Not responsible for loss or damage by fire or water." *Held*, that cotton being very inflammable, and, when ignited, difficult to extinguish, it was the duty of the railroad company to have stored F. & Co.'s cotton in box-cars, or in the safest cars in use for the transportation of such goods, and the failure to provide the same was negligence, and renders the company liable for the loss of the cotton, notwithstanding its special contract for exemption from loss by fire. *New Orleans R. R. Co. v. Faber & Co.*, 96.

24. A railroad company may stipulate with the consignor of goods against liability for loss by fire; but still the company is bound to the performance of all

CARRIERS—Continued.

the duties incident to its employment—as, the exercise of fidelity, skill, and care—and is required to use the safest approved motive-power, with the best appliances in use to arrest the escape of sparks of fire, and cars so constructed as to afford the greatest protection to the goods received for transportation. *Id.*

25. Wherever a loss of goods being transported by a railroad results from a cause against which the company has by a special contract stipulated for immunity, the company is still liable, notwithstanding the special contract, unless it can be acquitted of all blame for the loss. If the loss be attributable to the omission of the carrier to provide the safest vehicle in use for the transportation of the particular goods lost, or to a failure to do anything that diligence and care would suggest was feasible to have been done, the company is liable, even though it may have made a special contract for immunity against the cause of the loss. *Id.*

26. Although in the State of New York common carriers may by express contract exempt themselves from liability for their own negligence, yet such contracts in order to have such effect must be plainly and distinctly expressed so that their purport cannot be misunderstood by the shipper. *Nicholas v. New York, etc., R. R. Co.* 108.

27. A delivered certain trees to a railroad company for carriage and received a long printed shipping contract which he signed. This contract contained numerous provisions exempting the company from the extraordinary liabilities of carriers and also from liability "for damages occasioned by delays from any cause or change of weather." *Held*, that the terms of the shipping contract were not effectual to exempt the company from liability for a loss occurring through an unreasonable detention occasioned by the company's negligence. *Id.*

28. A railroad company transporting goods has no implied lien for demurrage. *Chicago and N. W. R. R. Co. v. Jenkins*, 118.

29. On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1883, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed. There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiff's own act in packing the rags in a damp state, without informing the defendants that special care was necessary.

Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods—

Held, that the ruling of the judge was correct. *Baldwin & Co. v. London, etc., R. R. Co.*, 175.

30. A common carrier at common law is liable for the loss or damage to goods received for transportation from whatever cause arising, except the act of God, the public enemy or the conduct of the owner of the goods, unless such loss or damage arises from the nature and inherent character of the property carried, provided he has used foresight, diligence, and care to avoid such damage and loss. *McGraw v. Balt. & Ohio R. R. Co.*, 188.

31. When a common carrier undertakes to convey goods, the law implies a contract that they shall be carried and delivered at the place of destination safely and within a reasonable time. *Id.*

32. Freezing weather causing a loss of goods cannot be deemed the act of God, and does not come within the definitions given of that term. *Id.*

33. But if the goods transported are frozen, it comes within the exceptions to that principle, and exempts the carrier from liability, provided he has been guilty of no previous negligence and misconduct, by which such loss or damage may have been occasioned. *Id.*

CARRIERS—Continued.

34. The previous misconduct or negligence which makes the carrier liable in such case, must be immediately or proximately connected with the loss. *Id.*

35. What is "reasonable time," within which goods are to be delivered, cannot be defined by any general rule, but must depend upon the circumstances of each particular case. *Id.*

36. The mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are matters properly entering into the consideration of what is reasonable time. *Id.*

37. B in Parkersburg delivered potatoes at the B. & O. R. R. Co.'s depot to be conveyed to McG. in Grafton on the 18th day of February, 1866, to be shipped on the 14th; there was a daily train between those points; the weather was mild and so continued on the 14th; the potatoes did not reach Grafton until the 16th, and arrived so frozen as to be worthless, the weather on the 15th and 16th having become cold. *Id.*

Held, Under the circumstances of this case the company is liable in damages. *Id.*

38. A sued a carrier for a breach of a contract to carry goods from B to C. One witness stated the value of part of the goods at B, but the rest of the evidence was confined to their value at C, and the court charged that this was the proper basis upon which to estimate the damages. The jury found for the plaintiff and judgment was so entered. *Held*, that defendant had suffered no injury from the evidence as to the value at B, and that therefore the judgment would not be reversed. *Evansville, etc., R. R. Co. v. Montgomery*, 195.

39. By statute railroad companies are given the exclusive privilege to carry freight and passengers over their respective roads, "provided that the charge for transportation or conveyance shall not exceed 85 cents per 100 pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger." *Held*, that the intention of the legislature was to confer upon each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; that the intent was not to proportion the charges by any unit of distance, but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within the limit to the company subject to the rule of the common law; that the charges should be reasonable and to the regulating power of the courts and the legislature. *Rogan et. al. v. Aiken*, 201.

40. The liability of a common carrier in the absence of special contract or proven custom, is that of an insurer until delivery, or what is tantamount to delivery. Such liability remains until either the property transported is actually delivered at its destination, or notice is given to the consignee to remove it, and the expiration of a reasonable time for such removal. *McKinney v. Jewett*, 209.

41. The terms of a bill of lading will not be construed to exempt a carrier from liability for negligence, unless there be an express stipulation to that effect. *Id.*

42. The bill of lading for certain hams forwarded by a railroad company provided that the company should be liable only as warehousemen while the goods were "at any of their stations awaiting delivery." It also required all goods to be removed from the cars "during business hours." The hams arrived in good time on Thursday at the point of destination, and were allowed to remain locked up in a car. The consignee inquired for them on Thursday and Friday, but was told they had not arrived. On Saturday at 5.30 P.M., the company informed the consignee of their arrival. On Monday morning the consignee removed them, when they were found to have been damaged by the heat and detention. In an action by the consignee against the company to recover damages for the loss,

Held, that the company was not exempted from liability by the terms of the bill of lading. *Id.*

43. Defendant contracted to transport on account of plaintiffs, "on board steamship Minnesota, or Nevada, for Liverpool, three hundred bales of cotton."

CARRIERS—Continued.

The cotton was then on its way from Mobile to New York, and the time of its arrival was uncertain. The Minnesota was advertised to sail October 27th, the Nevada a week later. The cotton was delivered at defendant's pier on October 26th; at that time defendant had a full cargo for the Minnesota, accepted and ready for loading; the cotton was therefore sent by the Nevada, and arrived at Liverpool a week after the Minnesota. Meanwhile the price of cotton had fallen. In an action to recover damages for alleged breach of the contract, *held*, the agreement was in substance, that if plaintiffs should deliver the cotton in reasonable time for loading it on board the Minnesota before its sailing day, it should be carried on it, otherwise upon the Nevada; but that the cotton was not delivered within such reasonable time; that defendant was not required to reject other freight to reserve room for the cotton, and so take the chance of being compelled to sail without a full cargo in case of its non-arrival, but had the right to accept what was offered to make sure of a full cargo, and was only required to carry the cotton on the first steamer if it was delivered on its pier before a sufficient cargo, accepted and ready for loading, was delivered; also, that defendant was not required to notify plaintiffs, on arrival of the cotton, that it could not go upon the Minnesota. *Fowler v. Liverpool, etc., Steam Co.* 235.

44. On arrival of the cotton upon the pier, defendant's agent gave receipts for it, each of which purported to be "memorandum of cargo on board steamship Minnesota." It appeared that these were intended simply as acknowledgments of delivery of the property, to be surrendered on delivery of the bills of lading, which constituted the contract of shipment. Bills of lading by the Minnesota were refused. *Held*, that the memorandum receipts did not vary the contract, or change the rights of the parties. *Id.*

45. Where M., on the 16th day of October, 1878, delivers a package of goods to an express company, to be transported by it from Lawrence to Dodge City, and on the arrival of the goods at Dodge City the consignee refuses to accept them, partly on the ground that they were not delivered (as it had been previously agreed they should be) on or prior to October 14, 1878, and principally on the ground that the goods were not such as he had ordered; and the evidence does not show that the express company was guilty of any fault or neglect; and the jury (in the action brought by the consignor against the express company for the value of the goods) finds in favor of the plaintiff, the consignor, and against the defendant, the express company; and the court refuses to set aside the verdict and grant a new trial; *held*, error. *Adams Express Co. v. McConnell* 240.

46. A memorandum of agreement was written in the following form: "Lead from B. to St. L. at 22½ per 100. All lead shipped by C. & R. to be forwarded by M. R., F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time." *Held*, that the import of the memorandum was that the railroad company was to transport and C. & R. were to deliver to the company for transportation at 22½ cents per 100 pounds all lead shipped by C. & R. within the year 1873 to St. L.; that C. & R. did not bind themselves to ship any lead, but they did bind themselves to ship over the road of this company any lead they should ship to St. L., and that this was sufficient consideration for the company's guarantee of rates. *Riggins v. Missouri River, etc., R. R. Co.* 242.

47. Plaintiffs agreed with defendant (a railroad company) for the transportation of all plaintiffs' lead for one year at a fixed rate of freight. During the year plaintiffs shipped some lead by another road, and the president of the railroad company hearing of it charged plaintiffs with having committed a breach of contract. Plaintiffs answered that there was no contract, to which defendant's president replied that defendant, on its part, would so understand the matter in the future. Shortly thereafter (on the 11th day of the month), defendant notified plaintiffs that from and after the 15th they would be required to pay a new and increased rate of freight. In the interval between the 11th and the 15th, plaintiffs shipped several car-loads of lead over defendant's road at the old rate. This was also the rate at the time charged to all shippers. In an action upon the con-

CARRIERS—Continued.

tract, defendant having pleaded the foregoing breach, and plaintiffs having replied waiver of the breach, the court instructed the jury, in substance, that if they believed the shipments made between the 11th and 15th were transported by defendant under the contract, and not in its capacity of common carrier, they would find that the breach had been waived. *Held*, correct. *Id*.

48. The duty of a railroad company is to carry freight to the place directed, and to deliver it to the party entitled if there ready to receive it, and if not, to store it for him. The liability of the company as a common carrier ceases when the freight is deposited in a warehouse, and is not extended by the act of 1870, ch. 17 (Code, sec. 1903j), requiring the company to give a prescribed notice to the consignee. *Butler v. East Tennessee, etc.*, R. R. Co. 249.

49. Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee. *Wacker v. Detroit, etc.*, R. R. Co. 251.

50. A carrier is not deprived of the protection afforded by the Carriers' Act (11 Geo. 4, & 1 Wm. 4, c. 68), s. 1, merely by the fact that the loss of the goods is temporary and not permanent, nor can the owner of goods, which ought to have been but were not declared pursuant to that statute, recover damages for the consequences of the loss of them, as distinguished from the loss itself. *Millen v. Brasch & Co.* 326.

51. The plaintiff delivered to the defendants, who were carriers for hire, from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence the trunk was put on board a vessel bound for New York, where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers' Act, the value of which exceeded £10. The plaintiff was obliged to replace at enhanced prices the articles within the Carriers' Act contained in the trunk. *Id.* *Held*, that the plaintiff could not recover from the defendants damages either for the temporary loss of the articles within the Carriers' Act or for being obliged to replace them at enhanced prices, a carrier being protected by the statute not only as to a loss but also as to all consequences flowing from it. *Id*.

52. Where a carrier fails to deliver goods entrusted to him for transportation, the true measure of damages is the value of the goods at the point of destination at the time they should have been delivered, together with the interest thereon, and a reasonable compensation for any expenses which were the natural and proximate consequences of the Carriers' Act. *Balt. & Ohio R. R. Co. v. Pumphrey*, 331.

53. A loss sustained by the consignee in his general business in consequence of special circumstances unknown to the carrier making the failure of the goods to arrive of peculiar moment to such consignee, does not constitute a valid ground for recovery. *Id*.

54. Carriers are bound in all cases to be diligent in their efforts to secure a delivery of goods to the parties entitled, but will be protected in refusing delivery until reasonable evidence is furnished that the party claiming is the party entitled, provided they act bona fide in the premises. *Id*.

55. Where the mark upon the goods differed from that in the way-bill, this circumstance was *held*, to justify the carrier in exercising caution in delivering the goods, and may be submitted to the jury in this connection. *Id*.

56. It is for the jury in such case to decide whether the delay in the delivery was reasonable, and caused solely by the delay in identifying the goods. *Id*.

57. Act authorizing board of railroad commissioners to establish rates of freight and fare constitutional. Such act does not impair contract implied in charter of a railroad company fixing maximum rate of freight and fares which may be charged. *Georgia R. & B. Co. v. Smith*, 385.

58. The evidence in the case held to show that cotton packed in bales was classified by common carriers as a heavy article and not as an article of measurement. *Bonham v. Charlotte, etc.*, R. R. Co. 418.

59. The undertaking of a common carrier, as a general rule, includes the obli-

CARRIERS—Continued.

gation to deliver the goods safely, at the place of destination, either to the consignee, or to his authorized agent; but, in the case of railroad companies, by universal custom, personal delivery to the consignee or his agent is not required. *S. & N. Ala. R. R. Co. v. Wood*, 419.

60. As to the necessity of notice to the consignee, of the arrival of the goods at the place of destination, there is a conflict in the authorities; but the preponderance of the decisions, contrary to the ancient rule, absolves railroad companies from the duty of giving special notice. *Ib.*

61. Where a railroad company has an agent or depot at the place of destination, the rule governing its liability, both as a common carrier and as a warehouseman, for goods received for transportation, is correctly stated in the case of *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209. *Ibid.*

62. A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot or agent; and when the consignee is fully advised, at the time of shipment, that the company has no depot nor agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at that place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman. *Ibid.*

63. The liability of a common carrier, for goods received for transportation, is not confined to losses or injuries resulting from the negligence of himself and his agents, but extends to and includes, in the absence of a special stipulation limiting it, every loss or damage which is not caused by the act of God, or of the public enemy. *Ibid.*

64. In an action against a common carrier, for a damage or injury to goods received by him for transportation, the general rule is, the damage or injury being shown, that the onus is on the carrier to show that his liability terminated before the loss or damage occurred. *Ibid.*

65. In an action against a railroad company as a common carrier, for the failure to deliver a quantity of corn received for transportation, the quantity received being a material question, the person who delivered it for the plaintiff having testified to the quantity, as ascertained from the number of barrels and the quantity of shelled corn measured out of one barrel, he may state, as a fact corroborating his measurement and calculation, that he afterwards filled the same barrel with corn out of the same crib, and again measured it out, with the same result as before. *Ibid.*

66. A debtor who ships cotton through a common carrier to his factor and creditor for sale and application to the debt, and sends the bill of lading, may afterwards change the shipment to another person without making the carrier liable to the first consignee. *Chaffe v. Miss. & Tenn. R. R. Co.* 426.

CHARTER, 432.

See CONSOLIDATION.

1. Act fixing rates of freight or fare which may be charged does not impair obligation of contract implied in charter by which maximum rates of freight and fare are fixed. *Georgia R. & B. Co. v. Smith*, 385.

2. Where the legislature of a State has repealed the charter of a street railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity, who asks an injunction on the ground that the repealing statute impairs the obligation of a contract. *Greenwood v. Union Freight R. R. Co.* 526.

3. Such a statute does impair the obligation of the contract of the charter, unless there is reserved to the legislature the right to repeal the statute under which the company was organized. *Id.*

4. In the State of Massachusetts such a reservation becomes part of every act of incorporation, by virtue of the following language in section 41, chapter 68, of the General Statutes, to wit: "Every act of incorporation passed after the

CHARTER—Continued.

eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature." The court here gives a history of the origin of this and similar clauses of reservation in the statutes of the States. *Id.*

5. The effect of the repeal of an act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into, and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights. *Id.*

6. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power. *Id.*

7. If the repeal of the old corporation was within the power of the Massachusetts Legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and, so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor. *Id.*

8. When the interpretation of a charter is doubtful, that construction is to be given to it which is most favorable to the public, provided it be equally reasonable. *Central, etc., R. R. Co. v. People, 546.*

9. It is competent for the commonwealth, through its courts, to waive a forfeiture of a charter, and it is generally its duty to do so when the infraction of its provisions is not willful. *Id.*

CHECKS, 392, 395.

See **BAGGAGE, 1, 2.**

CONNECTING LINES, 392, 395.

See **BAGGAGE, 1, 2.**

BILL OF LADING, 3.

1. A railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect. *Detroit and Bay City R. R. Co. v. McKenzie, 15.*

2. But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess. *Id.*

3. In an action to recover such excess, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance, is immaterial. *Id.*

4. A common carrier, who receives freight for transportation over his own route and the lines of other carriers, cannot bind such other carriers as to the rate to be charged for transportation, unless there is an agreement to that effect between them. And such other carriers will not be held to have impliedly assented to the rates charged by the first carrier, if, in receiving freight to be shipped over their routes under a bill of lading issued by the first carrier, they discover that the articles shipped are of a different character than those named in the bill of lading, and upon which the rates are higher. In such case they can transport the goods to their destination and charge and collect the increased rate. *Sumner v. Southern R. R. Ass'n., 18.*

5. The general freight agent of a railroad has no power to fix the rate over other connecting lines of railway; and an agreement between two connecting railroad companies to transport freight will not have the effect to make them joint contractors or parties. *Hill v. Burlington, etc., R. R. Co. 21.*

CONNECTING LINES—Continued.

6. The mere announcement of the rate for freight by the general agent of a connected railroad will not operate as a guarantee to the shipper of goods on the connected line. *Id.*

7. Among connecting carrier lines the common law duty of each road is only to safely carry over its own route and safely deliver to the next carrier. *Michigan Central R. Co. v. Myrick*, 25.

8. Each road may, however, extend its liability over the whole route by special contract; but such contract must be proved by clear and satisfactory evidence, and will not be inferred from doubtful expressions or loose language. *Id.*

9. The form of receipt in the case at bar construed not to be a contract to carry beyond the end of the line of the carrier giving it. *Id.*

10. The receipt of goods for a place named beyond the road of the company, the posting of through rates in its depots, and the agreement that the receipt might be exchanged for a through bill of lading, do not prove an assumption of liability beyond its line. *Id.*

11. A railroad company receiving goods for transportation may contract to carry them beyond the limits of its own road and of the State in which it is chartered, and may assume all the responsibilities incident to such an undertaking. In the absence of such contract, it is only liable for the extent of its own route and the safe storage and delivery to the next carrier. *Lindley v. Richmond, etc., R. Co.* 31.

12. The R. and D. R. Co. gave a through bill of lading for certain fruit trees to be transported over the Piedmont Air Line. The bill of lading contained clauses exempting the company from all liability except on its road, and in case of injury or delay restricting the right of action so that it should be only as against that road whereon the injury or delay occurred. The Piedmont Air Line consisted of three connecting roads operated by the R. and D. R. Co., but the line proper of said company constituted no part of it. The last of said above-mentioned three connecting roads received the trees in good time and delivered them fifteen days after in a damaged condition. There was no evidence, except as above, to show upon which road the damage occurred. In an action by the shipper against the R. and D. R. Co. to recover damages for the loss:

Held, That the terms of the bill of lading could not be held to exempt the defendant for liability for the loss occasioned by detention on the roads operated by it. *Held*, further, that the delivery in bad condition by the last of the lines connected with the defendant into whose hands the goods came constituted *prima facie* evidence of default on the part of defendant. *Id.*

13. The measure of damages in the above case was the difference between the market value of the goods at the time when they ought to have been delivered and the market value when they were in fact delivered, if in equally good condition, and, if not, with an increase to the extent of the deterioration resulting from the unnecessary delay in forwarding. *Id.*

14. Railroad companies have the power to contract to carry goods beyond their own line, and where they enter such contract they will be liable as a common carrier throughout the whole transit. *Cummins v. Dayton, etc., R. Co.* 36.

15. Three railroad companies whose lines formed a continuous road between X and Y, held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A and X shipped goods with one of the companies addressed to B at Y, and took a receipt whereby the company undertook to forward as per directions. Said receipt contained numerous provisions limiting liability, and provided that all the carriers transporting the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. *Held*, that said carrier had contracted to carry the goods through to Y, and was liable for a loss occurring in consequence of delay in said transit although the same occurred beyond its own line. *Id.*

16. Cotton was forwarded from Louisiana to be delivered in Providence, R.

CONNECTING LINES—Continued.

1. "rates guaranteed to Providence." By the error of some intermediate carrier the destination Providence was changed to Chicopee, Mass., whence, by the owner's direction, the P. and W. R. R. Co., after paying charges brought it to Providence. The owner refused to refund to the P. and W. R. R. Co. its charges for freight paid and replevied the cotton.

Held, that the P. and W. R. R. Co. had a lien on the cotton for its freight and charges for back freight paid. *Vaughan v. Providence, etc., R. Co.* 41.

17. Sending the cotton to Chicopee raised the freight above the amount guaranteed by the first carrier.

Held, that for this the owner might have his action against such first carrier, or against the carrier by whose error the cotton was sent to Chicopee. *Id.*

18. By delivery to the carrier in Louisiana the owner made each successive carrier his agent for forwarding the cotton. *Id.*

19. Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier, it is inferable, in the absence of evidence, that they continued so until received by the defendant. *Marquette, etc., R. R. Co. v. Kirkwood*, 85.

20. The P. and W. Railroad Company received, paid the freight charges on certain lots of cotton shipped from Louisiana to Providence, forwarded and delivered the cotton to the consignees. On delivery the cotton was found to be badly damaged by water, and the consignees claimed he right to recoup the damage from the bill of freight and charges of the P. and W. R. R. Co. *Knight v. Providence, etc., R. R. Co.* 90.

21. It appeared that the P. and W. R. R. Co. was not associated with the preceding carriers, and it did not appear where on the lines of transit the damage occurred. *Held*, that the recoupment could not be allowed.

22. A carrier receiving goods marked for delivery beyond the end of his line is, in the absence of a special agreement, only responsible for safe carriage over his line and safe delivery to the next carrier. *Id.*

23. When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance, or to a lien on the goods for the carriage price. *Id.*

24. In such cases each road is by mercantile custom entitled to pay the back charges and to a lien on the goods for such charges, and for its own carriage price. *Id.*

25. If goods received from a prior carrier are apparently in good order, a carrier is not obliged to open the packages for further examination, but has, for the back charges paid, a lien on the goods. *Id.*

26. After some parcels had been delivered to the consignees by the P. and W. R. R. Co. and found damaged they directed the Co. to receive no more parcels of the lot.

Held, that after such direction the company had no authority to receive the other parcels, or to pay any back freight upon them. *Id.*

27. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. *Denver, etc., R. R. Co. v. Atchison, etc., R. R. Co.* 374.

28. Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void as against public policy. *Id.*

29. When several carriers unite to complete a line of transportation, and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received. *Texas & Pac. R. R. Co. v. Fort*, 392; *Same v. Ferguson*, 396.

CONSOLIDATION.

1. Where two companies consolidate, the charter of one not being repealed, the new company takes the old road burthened with the restrictions as well as protected by the terms and conditions of the charter. *Hawkins v. Small*, 482.

2. The South Georgia and Florida Railroad Company, having received all it stipulated for, and having incorporated its stock with that of the Albany and Gulf Railroad Company, by accepting the stock of that company in lieu of issuing its own stock, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by the Atlantic and Gulf Railroad Company. It has lost nothing. It has not incurred any liability which is not protected by first liens on the road, the priority of which is conceded by all parties. *Branch v. Jessup*, 558.

CONSTITUTIONAL LAW.

1. An act imposing a penalty for allowing freight to remain unshipped for more than five days after receipt thereof is not unconstitutional. *Whitehead v. Wilmington, etc.*, R. R. Co. 168.

2. Where the Constitution of a State authorizes the General Assembly to regulate railroad freight and passenger tariffs and to prevent unjust discrimination, and to require reasonable and just rates of freight and passenger tariff, a law passed by such assembly establishing a board of railroad commissioners and authorizing them to make reasonable and just rates of freight and passenger tariff, of which a schedule should be made for each railroad in the State, and providing adequate penalties for the enforcement of the rules and regulations of such commission, such an act will not be regarded as unconstitutional as a delegation of legislative powers. *Georgia R. & B. Co. v. Smith*, 885.

3. Where the charter of a railroad corporation, which grants the company exclusive privileges, establishes a maximum freight and passenger rate, such a provision does not, in view of the maxim which requires a strict construction of a charter granting exclusive privileges, confer upon such railroad company a vested right to charge any rate less than such maximum, and an act establishing a railroad commission and authorizing them to establish a schedule of freight and passenger rates, and requiring all railroad companies to conform thereto, does not impair the obligation of any contract contained in such charter. *Id.*

4. The provision of the State Constitution of New York (Art. 3, § 18) prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws. *State v. Brooklyn, etc.*, R. R. Co. 454.

5. Accordingly, *held*, that said provision did not affect the provision of the Railroad Act of 1839 (§ 1, chap. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations "for the use of their respective roads; and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision. *Id.*

6. A railroad company relinquished its right to use steam power in consideration of a sum assessed on properties benefitted. Subsequently, in 1876, an act was passed authorizing the said company to use steam power in running its cars on a certain avenue.

Held, that said act of 1876 was not violative of the provision of the New York Constitution which prohibits the passage of any private or local bill granting "any exclusive privilege, immunity or franchise whatever." *Id.*

7. Also *held*, that the question whether an act is violative of the constitutional prohibition against legislation impairing the obligation of contracts, cannot be presented in actions brought by the State against defendants to which the

CONSTITUTIONAL LAW—Continued.

assessed land-owners, who alone have such contract rights, if any exist, are not parties. *Id.*

8. It is the duty of this court to determine a constitutional question only when it is directly and necessarily involved in the issue to be determined. *Id.*

9. It seems that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. *Id.*

10. A State statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times and for a reasonable compensation, to be agreed upon by the parties or fixed by the railroad commissioner, does not conflict with the constitutional provision that Congress shall have power to regulate commerce between the States. *Rae v. Grand Trunk R. R. Co.* 470.

11. A general law in Massachusetts provides that every act of incorporation shall be subject to amendment, alteration or repeal at the pleasure of the Legislature. A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States if it provides for compensation for the property of the extinct corporation so taken by the new one. *Greenwood v. Union Freight R. R. Co.* 526.

12. It seems that under the constitution of Colorado, so much of any act as is not directly germane to the subject expressed in the title, is without force. That the provision of the constitution is a mandatory declaration of an essential condition to the validity of legislative enactments. *Central, etc., R. R. Co. v. People*, 546.

CONSTRUCTION.

Promissory note construed given in aid of construction of a railroad. *Stowell v. Stowell*, 598.

CONTRACT, 25, 48, 54, 59, 85, 454, 484.

See **CARRIER 8, 11, 22; CONSTITUTIONAL LAW 5; CONTRACTOR 1; MAILS.**

1. Contract to build wall not enforced by mandamus. *State v. Paterson, etc.*, *R. R. Co.* 184.

2. Ellerman, by contract with the city of New Orleans, became the lessee of all the public wharves owned by the city for a period of near five years, with all the rights, privileges and franchises of the city in regard to said wharves. The legislature having authorized the railroad company to construct a wharf of its own for the accommodation of vessels doing business in connection with its road, that company permitted other vessels to use the wharf, for which it charged compensation. On a bill filed by Ellerman to enjoin the use of appellant's wharf this court held: That Ellerman had no such exclusive right by his contract with the city to have all vessels land at the wharves leased by him from the city and pay him for so doing, as would enable him to sustain his suit. *New Orleans, etc., R. R. Co. v. Ellerman*, 144.

3. Where parties make and sign a memorandum of agreement with the understanding that a formal contract embracing the same stipulations is thereafter to be written out and executed, if they afterward act upon the memorandum it will be treated as a valid and binding contract, though never written out in a formal manner. *Riggins v. Missouri River, etc., R. R. Co.* 242.

4. If rescission be relied upon as a defence to a contract, it must be specially pleaded. Proof of the fact will not be admitted under a pleading which only denies the making of the contract and avers a breach of it. *Id.*

5. When payment of fare is condition precedent to passage of title. *Evansville, etc., R. R. Co. v. Erwin*, 252.

6. The assumption by one railroad of the debts of another and the purchase of

CONTRACT—Continued.

a majority of its stocks, bonds, and equipment, is void as against public policy. *Eckins v. Camden, etc.*, R. R. Co. 590.

7. Where property is conveyed to trustees in trust, for the benefit of a railroad company, under a contract which is contrary to public policy, and illegal, a court of equity will not aid either party in any effort he may make to reap the benefits which may flow from such illegal contract. *St. Louis, etc., R. R. Co. v. Mathers*, 600.

8. So, where the owner of lots conveyed the same in trust, for the benefit of a railroad company, in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterward reconveyed the property back to the grantor, it was *held*, that the company could not maintain a bill to have the lots sold for its benefit, and have the same again conveyed to a trustee for its benefit, nor could it claim the right to have the taxes paid on the lots made a charge thereon for its reimbursement. *Id.*

9. In determining whether a contract is illegal, the entire contract on both sides will be considered, and if the consideration is illegal, no part of it will be enforced. One part can not be disregarded and the other enforced. *Id.*

CONTRACTOR.

1. If a railroad company let a contract to construct a road to a firm, and that firm sub-lets the contract to another firm, which does a large amount of work, and the first firm fails and does not pay the sub-contractors, and the railroad company to induce the sub-contractors to go on with the work agrees to pay to them the debt of the contractors, such agreement is founded on a valid consideration and is binding. *Chapman v. Pittsburg, etc., R. R. Co.* 484.

2. Where contractors building road have accepted stock in payment, they are estopped from questioning validity of mortgage given upon the road. *Branch v. Jesup*, 558.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE (CONTRIBUTORY).

CORPORATION.

1. The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer. *Rogan et al. v. Aiken*, 201.

2. The bill alleged that a particular railroad, with all its property, effects and franchises, was sold under the proceedings by the State against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight. *Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual. *Id.*

3. Where a railroad is bought in at judicial sale and the purchasers organize a new corporation, the old company is not liable for the operation of the road between the time of the sale and the organization of the new company, unless its possession be affirmatively shown. *Pittsburg, etc., R. R. Co. v. Fierst*, 487.

4. The provisions of the Railroad Acts of New York (§ 1, chap. 282, Laws of 1854; § 1, chap. 409, Laws of 1873; § 1, chap. 710, Laws of 1878) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad corporation to organize a new corporation for the purposes of the transfer, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case where there is no such existing corporation. It is not essential for the purchasing company to file a map of the line thus acquired where it is already constructed. *State v. Brooklyn, etc., R. R. Co.* 454.

CORPORATION—Continued.

5. A railroad corporation may have an existence in more than one state, if chartered or licensed to build its road in more than one state. *Honon v. Balt. and Ohio R. R. Co.* 496.

6. The Baltimore and Ohio Railroad Company is a domestic corporation of this State and liable to be sued here; and the court will take judicial cognizance of that fact. *Id.*

7. An insolvent corporation had been in the hands of this court since 1876, and its railroad operated through a receiver appointed by the chancellor. The injunction restraining the managers of the corporation from interfering with or exercising the franchises of the company was modified in order to allow the stockholders to hold an election for directors, and thereunder certain stockholders made a written application to the existing board of directors to order an election of new directors, at the time designated by the by-laws for holding such annual election. This the directors refused to do. On application to the chancellor, *held* that he might order an election of directors by the present stockholders, and so ordered; such election to conform as nearly as possible to the requirements of the by-laws of the company. *Lehigh Coal and Nav. Co. v. Central R. R. Co. of N. J.* 512.

8. A railroad company having completed a railroad, and being engaged in operating it, must be deemed, in suits brought by it, a corporation *de facto*, and a private individual thus sued cannot contest its legal organization. *Wilcox v. Toledo, etc., R. R. Co.* 518.

9. When a railroad company has the right of constructing a particular line of railroad, with general power to purchase all kinds of property, of whatever nature or kind, it may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same. *Branch v. Jesup*, 558.

10. As a general rule, a corporation cannot dispose of its franchises, nor a railroad company its road, without legislative authority; but in this case it was *held* that the legislative authority existed. *Id.*

11. The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval. *Held*, that the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders. *Elkins v. Camden and Atlantic R. R. Co.* 590.

12. That it was void and against public policy, in that its object was to prevent lawful competition. *Id.*

13. That it could be enjoined upon the application of a single stockholder of the purchasing company, and that the fact that such stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, would not affect his right to relief. *Id.*

14. When corporation is liable on contracts entered into with promoters. *Little Rock, etc., R. R. Co. v. Perry*, 610.

15. A corporation is bound only by its own contracts, and not by those of the individual members in their private capacity. *Id.*

16. The State alone can set up and take advantage of the incapacity of a corporation under its charter to purchase and hold the stock of another corporation. *Matthews v. Murchison*, 698.

CORPORATE DUTIES, 1.

See *CARRIER*, 1, 2, 3, 4.

COTTON, 418,

See *CARRIER*, 58.

CRIMINAL LAW.

See *INDICTMENT*.

CUSTOM, 76.

See *CARRIER*, 16.

DAMAGES, 59, 195, 348.

See CARRIER, 38; EVIDENCE, 3; TICKET, 6.

1. As to damages for delay in the transportation of goods where delay is partly not the fault of the carrier. *Detroit and Bay City R. R. Co. v. McKenzie*, 15.

2. Measure of damages where goods are unduly detained in course of transit and in consequence become deteriorated in value. *Lindley v. Richmond, etc.*, R. R. Co. 81.

3. In a suit to recover damages for the loss or destruction of family portraits, which have no market value, the jury may look to their original cost and to the probable cost of reproducing and replacing the same. *Houston and T. C. R. R. Co. v. Burke*, 59.

4. In an action of trover against a carrier for misdelivery of goods, the measure of damages is the market value at the time of the conversion less the freight, with interest. *Forbes v. Boston and Lowell R. R. Co.* 76.

5. Where an injury is wantonly and willfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages, by way of punishment for the wrongful act, but the party is not "entitled" to such damages as a matter of right, and it is error to so instruct, in any case. Whether the party may have such damages rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment in this respect. *Wabash, etc., R. R. Co. v. Rector*, 264.

6. A principal is not liable for the unauthorized malicious act of his agent in exemplary damages, unless he ratifies the act. *Galveston, etc., R. R. Co. v. Donahoe*, 267.

7. Where goods are lost by a carrier the owner cannot recover damages for the consequences of the loss as distinguished from the loss itself. *Millen v. Brasch & Co.* 826.

8. Where a carrier loses goods the measure of damages is the market value of the goods at their destination, with interest from the time they should have been delivered. A loss in the consignee's general business in consequence of special circumstances unknown to the carrier making the failure of the goods to arrive of peculiar moment, is not a ground for recovery. *Balt. and Ohio R. R. Co. v. Pumphrey*, 331.

9. Measure of damages in case of expulsion of passenger improperly holding non-transferable ticket. *Post v. Chicago, etc., R. R. Co.* 845.

10. The plaintiff, on the facts stated and proven, may, in Tennessee, recover whatever damages he may be entitled to, whether his action sounds in tort or ex contractu, all forms of action having been abolished by the Code. *Hall v. Memphis, etc., R. R. Co.* 848.

11. In an action against a railroad company by a passenger upon one of its passenger trains for damages received by the plaintiff in an accident alleged to have been occasioned by the company's wanton disregard of its legal obligations, and by its gross negligence in running its train, the court trying the cause permitted the counsel for the plaintiff to read to the jury the following quotation from *Redfield on Carriers*, viz.: "Section 539. The truth is, that common juries, with the highest instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession," etc. *Held*, error sufficient to entitle defendant to a new trial. *Houston, etc., R. R. Co. v. Nichols*, 361.

12. A charge that would tend to limit a recovery for all injuries received to a recovery for only a part of the injuries made the basis of the claim, was properly refused, as it made the capacity for labor at the time of the injury the standard by which a life's labor was to be estimated. *H. and T. C. R. R. Co. v. Boehm*, 366.

13. There was no error in refusing to instruct the jury, "You cannot find any damages by way of compensation for the lessened capacity to labor for the period of plaintiff's life, there being no evidence to show what would purchase an annuity equal to the value of his labor for the duration of his life, and no basis

DAMAGES—Continued.

has been furnished for making the calculation, and you will allow nothing, on this account, for permanent injuries, if any." There is no rule of law requiring the production of such testimony. *Id.*

14. Where the suit was brought to recover only compensatory damages, the court having instructed the jury that they would find such actual damages as the evidence showed the plaintiff had sustained, and set out the several reasons, or grounds, for which damages might be found, none of these grounds being punitive in character; *held*, that the instruction that "You will allow only damages by way of compensation, and nothing for punishing the defendant," was properly refused. *Id.*

15. Where the verdict is not clearly excessive it will not be molested, especially so after the judge who tried the cause overruled a motion for new trial, based, among other grounds, upon the excessive character of the verdict. *Id.*

16. The trial jury instructed the judge that "You may ascertain the value of plaintiff's services to himself before the injury and the value of his services since, and ascertain the difference, and then the jury would be authorized to give such a sum as would, at legal rate of interest, produce a sum equal, per annum, to that difference." *Held* to be not maintainable upon principle, as thereunder plaintiff would not only receive full compensation, but in addition would receive a donation. *Id.* *H. and T. C. R. R. Co. v. Burke*, 369.

17. Where baggage is lost the measure of damages is the value of the property cost in the market. *Texas, etc., R. R. Co. v. Ferguson*, 395.

18. Damages cannot be recovered for expense incurred in making search for lost baggage. *Id.*

Interest is not recoverable on unliquidated demands. *Id.*

19. What evidence is sufficient to sustain a verdict of damages against a railway company for failure and refusal to transport a passenger upon application and tender of charges. *H. and T. C. R. R. Co. v. Rand*, 399.

20. A mental suffering may be estimated as a basis of damages. *Id.*

21. What damages must be averred in the different clauses of the complaint, and what recovery is justifiable thereunder. *Schultz v. Third Ave. R. R. Co.* 412.

DEBT, 443.

See FORECLOSURE, 3.

DEBTOR AND CREDITOR, 426.

See CARRIER, 66; GARNISHMENT.

DECLARATIONS, 178.

See AGENT, 4; EVIDENCE, 6.

DEMURRAGE, 113.

See CARRIER, 28; LIEN, 6.

DIRECTORS, 702.

See OFFICERS, 7-8.

DISCRIMINATION.

1. Railroad companies are not forbidden by the common law or by the constitution and statutes of the State of Texas to make a discrimination in their rates of freight. They are only forbidden to make an unjust discrimination. *Houston and T. C. R. R. Co. v. Rust et al.* 123.

2. Whether in any particular case the discrimination has been unjust is a question for the jury. *Id.*

3. A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and reasonable and not inconsistent with the public interest. *Rogan et al. v. Aiken*, 201.

4. A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable. *Id.*

5. An association of carriers whereby the parties agree to refuse to carry or to

DISCRIMINATION—Continued.

discriminate against freight carried over other than the associated roads, is void as against public policy. *Denver, etc., R.R. Co. v. Atchison, etc., R.R. Co.* 874.

DISTRICT ATTORNEY, 543.

See **ATTORNEY-GENERAL, 3.**

DOMICILE.

A railroad corporation may have an existence in more than one State if chartered or licensed to build its road in more than one State. *Henon v. Balt. and Ohio R. R. Co.* 496.

ELECTION.

The right of the stockholders of a railway corporation to elect directors is not affected by the sale of the property of the corporation by a receiver, under an order of court. *State ex rel. v. Merchant et al.* 516.

At a meeting of the stockholders, called for the election of directors, under section 8246 Revised Statutes, the right to choose the inspectors or judges of election is vested in the stockholders, and the directors, against the will of the stockholders present, cannot appoint such inspectors. *Id.*

Circumstances under which a court of equity may direct the election of directors of an insolvent company by the stockholders when the corporation is in the hands of a receiver. *Lehigh Coal and Nav. Co. v. Central R. R. Co. of N. J.* 513.

EMINENT DOMAIN, 526.

See **CONSTITUTIONAL LAW, 11.**

The court will not take judicial notice that a railroad company under its charter condemned or acquired title to any particular land or strip of land. *Chapman v. Pittsburg, etc., R. R. Co.* 484.

ENGINEER, 433.

See **OFFICER, 1.**

EQUITY, 484.

See **EXECUTION, 3; INJUNCTION.**

1. A bill in equity by creditors of a railroad corporation alleged that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors: that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for a long term of years, at a rental which would not pay the interest upon its indebtedness; and that the execution of the lease would be injurious to the interest of its creditors and stockholders. The prayer of the bill was for an injunction to restrain the corporation from further prosecuting its business, and for the appointment of receivers. *Held*, that the bill did not state a case within the equity jurisdiction of the court. *Pond v. Framingham, etc., R. R. Co.* 551.

2. Equity will not lend its aid to enforce an illegal contract. *St. Louis, etc., R. R. Co. v. Mathers*, 600.

3. Where a party pays taxes on lands which belong to another, through a mistake as to the ownership, equity will not lend its aid to reimburse him. *Id.*

4. Relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law. *Little Rock, etc., R. R. Co. v. Perry*, 610.

5. When a complaint at law discloses a purely equitable cause of action, it may be transferred on motion of either party, or of the court's own motion, to the equity docket; but the failure of the court to make the transfer, when neither party asks it, will not be error for reversal. The rule is the same where a purely legal action is brought in equity. *Id.*

6. When a complaint in equity contains any equitable element to which the jurisdiction of a Court of Chancery may attach, the court may, in the same cause, administer all proper legal relief essential to complete justice at once to all parties before it; but actions at law, purely legal upon their face, must be decided on legal principles alone.

ESTOPPEL, 558, 689, 670, 698.

See **CONTRACTOR** 2; **MORTGAGE** 2; **REORGANIZATION** 2; **STOCK AND STOCKHOLDERS** 9, 15.

EVIDENCE.

1. In a suit for damages resulting from the loss by a common carrier of a family portrait, a member of the family was permitted to testify that he knew the value (stating it) of the painting from family tradition and from his deceased father. Aside from this, artists testified that the painting was worth that amount, though other witnesses swore to a less value. The court in the charge authorized the jury to look to the original cost, etc., in determining value. *Held*,

(1) That the error in permitting the hearsay evidence required a reversal of the judgment, exception being taken in time.

(2) Whenever improper evidence has been admitted which may have influenced improperly a jury, the error requires a reversal of the judgment. *Houston & T. C. R. R. Co. v. Burke*, 59.

2. Notice of objections to the manner or form of taking depositions is in time if given before both parties have announced ready for trial. Until then the trial of the suit has not, in contemplation of the statute, commenced. *R. S.*, art. 2285. *Id.*

3. It is error to permit a witness to give his opinion as to the measure of damages, that being matter of law. *Id.*

4. A witness may, while on the witness stand, refresh his recollection as to the value of specific articles by referring to a bill of particulars, known to him to be a copy of a correct memorandum of their value, made by himself. *Id.*

5. A court has no right to instruct a jury, or suggest to them, that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony. *Marquette, etc., R. R. Co., v. Kirkwood*, 85.

6. The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiffs and his assignors were burned therein, as to what occasioned the fire: *Held*, upon the facts stated in the opinion, inadmissible in evidence. *Mayer v. Virginia, etc., R. R. Co.* 178.

7. The circumstances held to show the identity of a conversation, the particulars of which were denied by an impeaching witness. *Evansville, etc., R. R. Co. v. Montgomery*, 195.

8. Generally a party cannot impeach the credibility of his own witness; but he may, for this purpose, prove contradictory statements of an unfriendly witness, whom he is entrapped into calling, and by whose testimony he is surprised. *Moore v. Chicago, etc., R. R. Co.* 401.

9. If the circumstances raise a presumption that the party, when he introduces the witness, knows that he will not testify as he represents, evidence of surprise is requisite before the contradictory statements will be admitted. *Id.*

10. A plaintiff who, in a suit for damages against a railroad company, calls witnesses who testify that they were not present when he was injured, cannot, in order to impeach their credibility, ask them whether they have stated otherwise to designated persons. *Id.*

11. If the plaintiff excepts to such ruling on the point so presented as to involve only his right to impeach his witnesses' credibility, this court cannot consider the case as it would have been if he had stated at the time that his purpose was to refresh their memories. *Id.*

12. Whether the court can examine persons in the defendant's service at the plaintiff's suggestion without affecting his right to impeach them, quære; but the power, if it exists, is discretionary, and refusal to use it is not error, whatever its unwarranted exercise may be. *Id.*

13. Admissions of a conductor, made days after a passenger falls from his train, that he kicked him off, are not part of the *res gestæ*, and do not bind the railroad company. *Id.*

14. The evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and another witness for defendant, that this was not so, but the plaintiff jumped from the car. *R.*, one of plaintiff's witnesses, a

EVIDENCE—Continued.

car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order so as to fix the company with liability in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded. *Held* error, *Schultz v. Third Ave. R. R. Co.* 412.

15. It is competent for a party against whom a witness has been called to prove acts or declarations of his, showing feelings of hostility or malice on his part toward such party. If upon cross-examination he denies such facts, they may be proved by other witnesses, as the inquiry into his state of feeling toward the party is not collateral. *Ibid.*

16. It seems, however, that the evidence to show hostile feelings of a witness should be direct and positive and not very remote. *Ibid.*

EXECUTION, 201, 447.

See CORPORATION 1, 2; FORECLOSURE; STOCK 1.

1. A railroad property and franchises were bought at judicial sale by H. and others, who subsequently, under the provisions of the Act of April 8th, 1861, organized a railway company. *Held*, that the company was not liable for the operation of the road during the time intervening between the purchase and the organization of the company, unless the possession of the company was affirmatively shown. *Pittsburg, etc., R. R. Co. v. Fierst*, 437.

2. The presumption was that H. and not the company was in possession of the road between the date of the sale and the time of filing the certificate of organization. *Ibid.*

3. Where a strip of land with a railroad track thereon in a proceeding against a foreign corporation and with no charter privilege from this state, in which the road is situated, is attached at the suit of a creditor, and it does not appear in the record that any railroad chartered in this state has any interest therein, the Court will regard the strip of land so attached as ordinary real estate; but no decree with reference thereto or sale of the land thereunder can affect the rights of any railroad chartered in this state or any interest of such railroad in such land, of whatever character that interest may be, such road not being a party to the suit. *Chapman v. Pittsburg etc., R. R. Co.* 484.

EXEMPTION LAW.

1. A railroad company, the lines of which extended through Ohio and West Virginia, owed one month's wages to a brakeman resident in Ohio. By the laws of Ohio one month's wages are exempt from attachment and execution. A creditor of the brakeman instituted attachment proceedings against him in West Virginia, attaching the wages due by the company. The brakeman had notice of the proceedings, but did not appear, and the company, under order of the West Virginia court, paid into court the amount in its hands as satisfaction of the debt. An assignor of the brakemen subsequently brought suit against the company, in Ohio, for the amount of the wages due. *Held*, that the exemption law of Ohio did not extend in this case to West Virginia; that there was no presumption that a similar law existed in such state; that even if the brakeman could have set up such exemption in the West Virginia court, it did not appear that the company defendant could have done so; that the company did not appear to have neglected any duty incumbent upon it; that its payment of the amount of the wages due operated as a discharge, and that therefore plaintiff was not entitled to recover. *Eicheburger v. Pittsburg, etc., Ry. Co.*

2. The statute law of another state is a fact which must be proved like any other fact. In the absence of anything to the contrary, the presumption is that the common law obtains, and not legislation, similar to that of the state wherein the question arises. *Id.*

EXPRESS COMPANY, 240.

See CARRIER 45.

EXTRA TERMINAL LIABILITY.

See **CONNECTING LINES.**

FAMILY PORTRAITS, 59.

See **CARRIERS, 12; DAMAGES, 8.**

FENCE, 184.

See **MANDAMUS, 8.**

FIRE, 97, 161, 222.

See **CARRIER, 23; NEGLIGENCE; WAREHOUSE, 7.**

FORECLOSURE.

1. Act 96 of 1859, of Michigan, permits the purchasers on a foreclosure sale of the track and appurtenances of a railway company to exercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure. *Cook v. Detroit, etc., R. R. Co.* 448.

2. A statute giving clear title to foreclosure purchasers does no injustice to general creditors. *Id.*

3. A common law action for the debt of a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness. *Id.*

4. Purchasers of railroad at foreclosure sale may convey to existing railroad corporation. Said company need not file a map of the line thus acquired when it is already constructed. *State v. Brooklyn, etc., R. R. Co.* 454.

5. In a suit for foreclosure, commenced in a state court, and removed to the Circuit Court of the United States, a motion to remand the cause was made and overruled. Subsequently, a final decree of sale was passed. Upon appeal merely from the order confirming the sale, the final decree not disclosing, affirmatively, a want of jurisdiction, this court will not examine the record, prior to such final decree, to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different states; but, assuming that the final decree was within the power of the Circuit Court to render, will only examine the decree to ascertain whether the sale was had in conformity with its provisions. *Turner v. Farmers' Loan and Trust Co.* 580.

6. When bondholders are bound by a plan for the reorganization of the company after a foreclosure sale. *Matthews v. Murchison,* 693.

FORFEITURE, 546.

See **CHARTER, 9.**

FRANCHISES, 201.

See **CORPORATION, 1, 2.**

FRAUD, 59, 197.

See **ATTORNEY; CARRIERS, 11.**

FRAUDS, STATUTE OF.

A verbal promise of a corporation to pay a party's claim contracted with other parties prior to the incorporation is void by the Statute of Frauds. *Little Rock, etc., R. R. Co. v. Perry,* 610.

FREEZING OF GOODS, 188.

See **CARRIERS, 32, 33, 37.**

GARNISHMENT.

1. A debt due from one who may be sued in this state to a non-resident of this state, for services performed in the state of his residence, may be garnished in a suit instituted against him in the courts of this state,—personal service, or service by publication, having been duly made on him,—although his salary has always been paid in the state where he lived, and would have been exempt by the laws of that state. *Mooney v. Union Pacific R. R. Co.* 181.

2. By the statute 1876, c. 101, as amended by statute 1877, c. 158, a new, more direct and efficacious remedy to a creditor was created by conferring upon the

GARNISHMENT—Continued.

Supreme Judicial Court jurisdiction in equity, to reach and apply in payment of a debt due to such creditor any property, right, title or interest, legal or equitable, of his debtor residing or found in this State, which cannot be come at to be attached on a writ or taken on execution in an action at law, and which is not exempt by law from attachment and seizure. *Donnell v. Portland, etc.*, R. R. Co. 189.

8. The proceeding is in the nature of an equitable trustee process, to enable the creditor in one process to establish the validity and amount of his claim against his debtor, and compel the appropriation of the debtor's property, of whatever kind, provided it be not exempt or within reach of legal process, in the hands of some third person to the payment of his debt. *Id.*

4. There must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. An officer of a corporation cannot be held to sustain that relation to the corporation as a debtor. *Id.*

5. A garnishee cannot be held in justice's court except upon such liability as is admitted by the disclosure, which must not be ambiguous. *Wacker v. Detroit, etc.*, R. R. Co. 251.

6. A railway company, being garnished, disclosed by its agent that as common carrier it had in its possession goods consigned to the principal defendant, but the agent did not know whether they belonged to such defendant and had no personal knowledge of his business or of other consignments. *Held*, insufficient to make the company liable as garnishee in a proceeding before a justice. *Id.*

7. The garnishment statute does not attempt to cut off the rights of strangers to the litigation or to compel a garnishee at his peril to decide questions of fact as to ownership on which he has no means of knowledge. *Id.*

GIFT.

It is essential to constitute a valid gift that there should be a delivery such as vests in the donee control or dominion over the property, and absolutely divests the donor, and the delivery must be made with intent to vest the title in the donee. *Jackson v. Twenty-third St. R. R. Co.* 648.

ICE AND SNOW, 127.

See MUNICIPALITY.

ILLEGAL CONTRACT, 590, 600, 702.

See CONTRACT, 6, 7, 8, 9; CORPORATION, 11, 12, 18; EQUITY, 2; OFFICERS, 8.

INDICTMENT.

1. If one willfully places on a railroad track, used by and on which engines and carriages conveying persons are likely to pass, any obstruction likely to produce disaster to such engines or carriages, and to endanger the safety of the persons conveyed thereon, he is guilty of the offence described in section 63, c. 94, Gen. St. 1878, though no engine or carriage be actually stopped or impeded by such obstruction. *State v. Kilty*, 158.

2. An indictment for violating the act of 1877, ch. 4, in shooting or throwing a missile at a railroad car or locomotive, which fails to charge that the same was in actual motion or stopped for a temporary purpose, is defective. (*State v. Hinson*, 82 N. C., 597, cited and approved); *State v. Boyd*, 155.

3. Where one enters a moving car in one county, with intent to commit a larceny in such car, and with the same intent continues in the car until it passes into another county, and there commits the intended larceny, there is in law a fresh entry in the latter county, and the offence is indictable therein under the statute. *Powell v. State*, 156.

INJUNCTION, 551.

See EQUITY, 1.

1. A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceeded from a source entitled to credit, and inform the defendant clearly and

INJUNCTION—Continued.

plainly from what act he must abstain. *Cape May, etc., R. R. Co. v. Johnson*, 476.

2. It is an established rule of the Court of Chancery that it is not open to any party to question the orders of the court, or any process issued under its authority, by disobedience; and even where the order is improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. *Id.*

3. An attempt to justify such disobedience by showing that the act was committed after consultation with counsel, and upon his advice to disregard the notice, will afford the defendants neither justification nor palliation. *Id.*

4. Where the Legislature repeals the charter of a street railroad and transfers its franchises and track to another, and the corporation declines to seek redress, a stockholder has a footing to obtain an injunction on the ground that the repealing statute impairs the obligation of a contract. *Greenwood v. Union Freight R. R. Co.* 526.

5. A single stockholder may obtain an injunction to restrain the purchase by one railroad of the majority of the stock, bonds and equipment of another, where such purchase would be ultra vires and opposed to public policy. *Eckins v. Camden, etc., R. R. Co.* 590.

6. A bondholder in a corporation cannot obtain an injunction to restrain the directors thereof from sacrificing its interests to another corporation, where the company is solvent and abundantly capable of responding in damages to the complainant. *Matthews v. Murchison*, 693.

INTEREST.

Interest, as a general rule, is not recoverable on unliquidated demands, and it cannot be said that the recent modifications of the rule have unsettled the rule heretofore applicable in Texas. *Texas, etc., R. R. Co. v. Ferguson*, 395.

JURISDICTION, 580.

See FORECLOSURE, 5.

1. It is no longer necessary to take advantage of the want of the requisite citizenship by plea in abatement. If this or any other defect of jurisdiction appears upon the trial, it is the duty of the court upon its own motion to stop the proceedings and dismiss the suit. *Rae v. Grand Trunk R. R. Co.* 470.

2. An amendment to the declaration, designed to raise a question "under the constitution and laws of the United States," and thereby to create a case cognizable by the circuit court, irrespective of the citizenship of the parties, will not be permitted unless it appears that it will be likely to avail the plaintiff. *Id.*

3. An order of a state court removing a case at law to the circuit court of the United States under section 639, page 114, of the Revised Statutes of the United States, 2d ed., is reviewable by the Supreme Court of Appeals of this state by writ of error, and upon such review said Supreme Court of Appeals may reverse or affirm such order, as justice and the law may require in the opinion of such court. *Henen Admir. v. Balt. and Ohio R. R. Co.* 496.

4. Where a petition is filed in a state court praying the removal of a case from such court to a circuit court of the United States under said section 639 of the said Revised Statutes, the state court ought not to receive the bond offered by the petitioner, unless the condition of the bond so offered contains the material parts prescribed and required by said section in such a case. *Id.*

5. Where a domestic corporation is sued is issued in the courts of this state by a citizen thereof, such suit cannot be removed into the circuit court of the United States for the district of West Virginia, in such case said 639th section of said Revised Statutes does not apply to or embrace the said company. *Id.*

6. A suit does not arise under the constitution and laws of the United States where the public acts of one state are to be construed in an action pending in a court of another state. *Chicago and A. R. Co. v. Wiggins Ferry Co.* 509.

7. The General Term of the Supreme Court of New York, except as limited by statute, has all the power and all the general jurisdiction of the Supreme Court. *Syracuse Savings Bank v. Syracuse, etc., R. R. Co.* 585.

JURISDICTION—Continued.

8. Said General Term has the power to attach any conditions it sees fit to the affirmance of an order of Special Term, when the vacating or affirmance of the order is within its discretion. *Id.*

9. In an action brought under the Revised Statutes against a railroad corporation by a judgment creditor to sequester its assets, etc., a receiver was appointed, who, upon motion of stockholders holding a minority of the stock, without notice to the others, was ordered to sell the property and franchises of the company. Thereafter a motion was made by stockholders holding a majority of the stock, on notice to the receiver and those stockholders who made the former application, for an order vacating the order of sale; this motion was denied. On appeal to the General Term the order denying the motion was affirmed, but a stay of proceedings under the order of sale was granted until the further order of the court, without prejudice to a new application to vacate said order of sale. On appeal from so much of the General Term order as granted the stay, and stated that the affirmance was without prejudice, *held*, that the portion of the order appealed from was within the discretion of the court below, and was not reviewable here; that as it appeared that the appellants were a minority of the stockholders, and that the stock was absolutely worthless as such, and it did not appear that any creditors asked for the sale, also it appearing that efforts were being made by the majority to utilize the road, there were facts sufficient before the court, upon which it could exercise its jurisdiction. *Id.*

10. The Supreme Court of Missouri, after the transaction arose, and after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving stock as collateral security from the corporation itself; and this decision being urged as conclusive upon the federal courts, *held*, that those courts are not bound to follow the decision of the state court in such a case. *Burgess v. Seligman*, 655.

11. The federal courts have an independent jurisdiction in the administration of state laws in cases between citizens of different states, co-ordinate with, and not subordinate to that of the state courts; and are bound to exercise their own judgment as to the meaning and effect of those laws. *Id.*

12. But since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, especially with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. *Id.*

13. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights had accrued. *Id.*

14. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. *Id.*

15. Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. *Id.*

16. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. *Id.*

JURISDICTION—Continued.

17. A judgment entered by consent for a specific amount, subject to any credits which the defendant may produce vouchers for, is good as between the parties themselves and their privies. *Id.*

LAND GRANT, 48.

See **MAILS, 1.**

LARCENY, 156.

See **INDICTMENT, 3.**

LIEN.

1. A carrier receiving goods from tortious holder has no lien for freight as against the owner. He has such lien, however, if he receives the freight from one who, by the owner's act, is clothed with apparent authority. *Vaughan v. Providence, etc., R. R. Co.* 41.

2. Lien of last carrier of freight when by error of preceding carrier goods are sent to wrong destination. *Id.*

3. Lien of one of several connecting lines for back charges paid by it and freight earned. *Knight v. Providence, etc., R. R. Co.* 90.

4. All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the railway company providing for a lien for demurrage, though published, without his or the consignor's assent thereto, when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. *Chicago and N. W. R. R. Co. v. Jenkins*, 118.

5. The law will never indulge in the presumption of assent to rules of a railway company for a lien for damages caused by delay in receiving the goods shipped, from the publication of the same. *Id.*

6. The right to demurrage does not attach to carriers by railroads. If it exists at all as a legal right it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract. *Id.*

LIMITATIONS.

See **BANKRUPTCY, 4.**

1. The Statute of Limitations does not run against a cause of action after a suit thereon is commenced, and during its pendency, and numerous cases hold that the mere commencement of a suit without service within the statutory period will prevent the statute from becoming a bar. *Chicago and N. W. R. R. Co. v. Jenkins*, 118.

2. Where not only new parties are made in a pending suit, but by amendment also, new rights or causes of action already barred are brought before the court, the Statute of Limitations may be properly set up as to such new matter, but not when no new rights are brought into the suit which were not barred when the suit was brought. *Id.*

3. In construing statutes of limitations, the courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. Cases or classes not enumerated are excluded from their operation by implication. *Id.*

4. An action under acts of Fifteenth Assembly of Iowa, chap. 68, for five times the amount paid as freight, in case of an overcharge, is an action for a statutory penalty, and, under sec. 2529 Code, is barred in two years. *Herriman v. Burlington, etc., Ry. Co.* 839.

5. The plaintiff holding an unsatisfied judgment against the trustees of the B. B. & C. sold-out railroad company, brought suit against the trustees and against the G., H. & S. A. Ry. Co., which was indebted in a large amount to the former, alleging that this indebtedness constituted the only assets available for the satisfaction of her claim, asking judgment against the G., H. & S. A. Ry. Co. Twelve years had passed since the B. B. & C. company was sold out. The trustees made no answer. The G., H. & S. A. company answered by a general de-

LIMITATIONS—Continued.

murder and denial, and alleging in general terms that the debts of the sold-out company exceeded largely its assets. *Held*, that from the lapse of time the presumption was that all the debts had been satisfied. That from the silence of the trustees and the indefinite answer of the G., H. & S. A. company, the presumption was either that the debts had been satisfied, or that the assets were amply sufficient to pay all. That such being the presumption, the suit by a single creditor to enforce payment of his judgment out of the trust fund was maintainable without attempting to make parties of other possible creditors. That the answer set up no defence. That the G., H. & S. A. Co. was protected, the trustees being parties to the suit. *Galveston, etc., R. R. Co. v. Butler*, 552.

LOCATION.

The map required to be filed by a railroad company is sufficient if it shows the alignment and profile; it is not essential that it should show all the connections, turnouts and switches. *New York v. Brooklyn, etc., R. R. Co.* 454.

MAILS.

1. The deductions under the thirteenth section of the act of Congress of July 12, 1876, and under the act of June 17, 1878, of the compensation to be paid for carrying the mails, cannot be made against a company whose railroad has been the subject of a land grant, when the service had been rendered during the term of a written contract for four years made by the Postmaster-General, and which had not terminated when the acts making the reductions took effect. *Chicago, etc., R. R. Co. v. United States*, 48.

2. The performance by the railroad company of the service imposed upon it by its contract, protesting against the reduction of compensation, is not a waiver of any rights under the contract. *Id.*

3. The sixth section of the act of Congress of July 1, 1862, c. 120, incorporating the Union Pacific R. R. Co. (12 Stat. 489), constitutes a contract between the United States and the company, whereunder the latter, for its service in transporting upon its road, from Jan. 1, 1876, to Oct. 1, 1877, the mails, and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service. *Union Pacific R. R. Co. v. United States*, 54.

4. The contract is not affected by the sections of the Revised Statutes declaring that the Postmaster-General may fix the rate for such service when performed by railroad companies to which Congress granted aid, and he had no authority to insist that it was not binding upon the United States. *Id.*

5. The company, having been required to perform the contract, lost no rights by a compliance therewith, as it protested against and rejected all illegal conditions attached to the requirement. *Id.*

MANDAMUS.

1. When the writ will lie to enforce performance by a railroad company of its duties to the public. *People v. N. Y. Central and H. R. R. Co.* 1.

2. Though a writ of mandamus will lie at the instance of a private individual against a corporation, to compel performance of a duty enjoined by its charter, to be executed for the benefit of the relator, or the class of individuals to whom he belongs, the allowance of the writ in such cases must be controlled by the fundamental principle that it is the absence of an adequate legal remedy that gives the court jurisdiction to proceed by mandamus. Two things must concur—a specific legal right, and the absence of an effectual legal remedy. *State v. Paterson, etc., R. R. Co.* 134.

3. The charter of the Paterson and Newark R. R. Co. authorized the company to construct its railroad along the Passaic River, with a proviso that in passing by the lands of the Mount Pleasant Cemetery, the said railroad should be constructed entirely outside, and to the east, of the present stone wall embankment, and that before entering upon the said lands, the said railroad company should enter into an agreement with the Mount Pleasant Cemetery Co. to construct a suitable stone wall between said railroad and the cemetery grounds. The com-

MANDAMUS—Continued.

pany located its road outside of the line indicated, and, before it commenced the construction thereof, executed and delivered to the cemetery company a bond conditioned to construct a wall in compliance with the charter, within three years. On application for a mandamus to compel the company to build the wall, *held*:

(1) That it was the legislative purpose to secure to the relator a satisfactory location of the railroad, and an agreement for the erection of a wall—to be enforced in the usual method by which contracts may be enforced, by action at law or by a bill for specific performance; and that the specific duty imposed on the company by its charter in this respect had been fully performed.

(2) That the relator had adequate legal remedy on the contract, and that, if that remedy had become inefficacious, by reason of delay, and the intervening insolvency of the obligor, the relator could have no relief by mandamus. *Id.*

4. The judges of the Courts of Common Pleas of Virginia have power at chambers to issue writs of mandamus. *State ex rel. v. Cheraw, etc., R. R. Co. 681.*

5. The peremptory writ in mandamus must conform to the alternative writ, but such conformity existed in this case. *Id.*

6. What is a sufficiently specific demand to authorize a proceeding by mandamus to enforce the delivery of certain shares of preferred stock. *Id.*

MAP, 454.

. See **LOCATION.**

MASTER AND SERVANT, 264.

See **PASSENGER, 5, 6.**

1. In an action for damages against a railway company on account of the wrongful arrest of a passenger on its train caused by the conductor, it was alleged that the conductor was "acting within the scope of his authority." *Held*, it was competent to prove that in the performance of the act the conductor was acting within the sphere of his authority as conferred by the company, or under its instructions. *Galveston, etc., R. R. Co. v. Donahoe, 287.*

2. The principal is not liable in exemplary damages for the unauthorized malicious act of its agent, unless such act is ratified or accepted by the principal. *Id.*

3. Negligence of the agent is negligence of the company, and the company is liable therefor. *H. & T. C. R. R. Co. v. Rand, 399.*

4. Admissions of a conductor, made days after a passenger falls from his train, that he kicked him off, are not admissible as part of the *res gestæ*. *Moore v. Chicago, etc., R. R. Co. 401.*

5. A railroad company is liable for the act of its conductor in throwing a passenger from the car. *Schultz v. Third Ave. R. R. Co. 412.*

6. The defendant, who was a section hand on the N. C. & St. L. R. Co., was assigned to plaintiff, who was a road overseer, to work the public roads. On being summoned by the plaintiff, the defendant refused to work, and alleged as an excuse that the railroad upon which he worked was originally the Nashville and Northwestern Railroad Company, the charter of which exempted the president, directors, clerks, agents, officers and servants from road duty. *Held*, that defendant was exempt, under the charter, from road duty, and that notwithstanding the consolidation of the Nashville and Northwestern Railroad with the Nashville, Chattanooga and St. Louis, it not appearing that the charter of the latter had been repealed, the new company took the old road burdened with the restrictions as well as protected by the terms and conditions of its charter. *Hawkins v. Small, 482.*

MISDELIVERY, 76, 80.

See **CARRIER, 13, 14, 15, 16, 17.**

MORTGAGE, 702, 723, 739.

See **BONDS, FORECLOSURE, RECEIVERS, 3-13.**

1. Prior to the purchase of the railroad, the Albany and Gulf Railroad Com-

MORTGAGE—Continued.

pany had executed a trust deed by way of mortgage upon all its railroad and property acquired or to be acquired. *Held*, that, inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the said road, when purchased, the same as it would have done had the company itself constructed it. *Branch v. Jesup*, 558.

2. The contractors who built the road and accepted in payment therefor the stock of the Atlantic and Gulf Railroad Company in lieu of that of the South Georgia and Florida Railroad Company, and the assignees and purchasers of said stock, after the transaction between the two companies has been carried into effect and the road has been possessed and operated by the Atlantic and Gulf Railroad Company for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia and Florida Railroad Company, or as preferred creditors as against the railroad itself. Having voluntarily accepted the position of stockholders of the purchasing company, they cannot question the validity of the transaction adversely to it, or to the mortgage given by it, covering the road in question. *Id.*

3. A mortgage of the road, and of the present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, is, while it retains possession, a poor lien upon the net earnings of the road. *Addison v. Lewis*, 702.

4. In what case the claims of mechanics and material men have priority of lien upon such net earnings. *Id.*

MUNICIPALITIES.

1. An ordinance requiring all persons to keep the sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises. *Taylor v. Lake Shore, etc.*, R. R. Co. 137.

2. Breaches of public duty must be punished in some form of public prosecution, and not by the way of individual recovery of damages; though when the duty imposed is for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution. *Id.*

3. When a municipal charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for the default in neglecting to observe such regulations, no action against a lot owner can arise, if at all, until after the city has been held liable in a suit against it. *Id.*

4. There can ordinarily be no judicial restraint or interference with municipal corporations in the bona fide exercise of powers, legislative or discretionary in their nature, provided private rights are not violated. *Cape May, etc.*, R. R. Co. v. *Cape May*, 474.

5. But when the corporation has fulfilled its legislative functions, and exercised its legislative discretion, and is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene. *Id.*

6. The repeal of an ordinance will not operate to disturb private rights vested under it. *Id.*

NEGLECT, 85, 161, 209, 264, 399.

See **APPEAL**; **AGENT**, 4; **BILL OF LADING**, 4; **CARRIER**, 21, 41; **DAMAGES**; **WAREHOUSE**, 4, 5, 6, 7.

1. In action for the destruction of property the allegation of ownership in the plaintiff is material, and a failure to deny it in the answer is an admission of its truth. *St. Louis, etc.*, R. R. Co. v. *Hecht*, 222.

2. A railroad company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train and main track, unless damages to the property of others are apparent, and the probable result;

NEGLIGENCE—Continued.

but if in doing so they stop them near the property of another and it is consumed, they are liable for the injury if by proper care under all the circumstances it could have been avoided. *Id.*

3. Though a burning railroad car which is run off on a switch to save the train and main track is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents, or employees, having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employees of the owner in other business not connected with the property are under no legal obligation to protect it, and their omission to do so is not contributory negligence on the part of the owner. *Id.*

NEGLIGENCE (CONTRIBUTORY), 323.

See **PRACTICE**, 19.

The negligent acts of a defendant which will subject him to liability notwithstanding the contributory negligence of the plaintiff are such as are committed after he becomes aware of the danger to which plaintiff has exposed himself. *Swigert v. Hannibal, etc., R. R. Co.* 323.

NEW TRIAL, 307, 401.

See **PRACTICE**, 17, 21.

NOTICE, 197, 419, 476.

See **AGENT**, 5; **CARRIER**, 60; **INJUNCTION**, 1.

Notice of assignment of train to agent in charge of depot and railroad business sufficient to bind the company. *Memphis, etc., R. R. Co. v. Koch*, 429.

OFFICER.

1. The office of chief engineer of the Western North Carolina Railroad is not a public office. The true test of a public office is that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. *Eliason v. Coleman*, 433.

2. It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. *Atchison, etc., R. R. Co. v. People*, 542.

3. An action for the usurpation of an office or franchise is a civil action under the Code of this State, and must be governed by the rules applicable thereto; must be instituted by filing a complaint and issuing a summons, and proceeded with the same as any other action. *Id.*

4. Where, by statute, authority is given to a particular officer, its exercise by any other officer is forbidden by implication. *Id.*

5. Under chapter twenty-five of the Code of Colorado, a proceeding instituted for the purpose of remedying the usurpation or misuse of a corporate franchise or a public office, is by civil complaint and summons. The criminal form of the old action is superseded by civil action. In terms, chapter seventy-three of the Revised Statutes, authorizing proceedings by quo warranto, is repealed by section 477 of the Code. *Central, etc., R. R. Co. v. People*, 546.

6. It seems that a mere statement of legal conclusions, with a demand that the defendant show by what authority it exercises a franchise, as was anciently tolerated when the proceeding was by information in nature of a quo warranto, would not be sufficient under the Code. *Id.*

7. The directors of a corporation are its officers or agents, and represent the interests of that abstract legal entity and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts, and these contracts may be made with the stockholders as well as with others. *Addison v. Lewis*, 702.

8. When the lender of money to a corporation is a director charged along with others with the control and management of the corporation, representing in this

OFFICER—Continued.

regard the aggregated interests of all the stockholders, his obligation, when he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him; but the general doctrine with regard to this class of contracts is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. *Id.*

PARTIES, 552.**SEE LIMITATIONS, 5.**

1. The general rule is, that when proceedings are had to sell the fee in land, it is not necessary to make the lessee of the land a party to the suit. *Chapman v. Pittsburg, etc., R. R. Co.* 454.

2. Where it does not appear in the pleadings or otherwise in the case, that a person has an interest in the subject-matter of the suit, he is not a necessary party to the suit. *Id.*

3. Where a firm takes a contract from a corporation to construct an improvement, and said firm sub-contracts to another firm, which does a large amount of work, and the first firm fails and cannot pay the sub-contractors, and to induce the sub-contractors to go on with the work the corporation assumes to pay the old debt due the sub-contractors, and releases the contractors from all obligations to pay such old debt, the first contracting firm is not a necessary party. *Id.*

4. The general rule is, that when it is necessary to adjudicate the rights of an assignee, the assignor must be made a party to the suit; but to this rule there is the exception, that where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is neither doubted nor denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party. *Id.*

5. If a person is not named in the bill, and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process. *Id.*

6. Although a person be named in the prayer of the bill and also in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill to which he could answer, and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest. *Id.*

PARTITION.

A railroad corporation, having purchased from another railroad company an undivided interest in the latter's railroad, under the act of April 7, 1868, in relation to insolvent railroad companies, etc., which authorizes such sale under certain conditions, if the sale can be made without impairing the usefulness of the road to the vendor company, whereby a tenancy in common was created between the parties, cannot compel partition of the common property either under the statute in relation to partition or in equity. *Pittsburgh, etc., R. R. Co. v. Central Ohio R. R. Co.*

PARTNERSHIP.

Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability. *Bray's Admr. v. Seligman's Admr.* 663.

PASS.—FREE PASS, 817.

See **PASSENGER**, 13, 14.

PASSENGER, 361.

See **DAMAGES**, 11; **SLEEPING CARS**, **TICKETS**.

1. The complaint in this case alleges that plaintiff, being a passenger upon

PASSENGER—Continued.

defendant's railroad, "solely by the negligence of the defendant in the premises, the car in which the plaintiff was . . . being conveyed ran off the track at or near Minneapolis with great force and violence, and that the plaintiff was thereby grievously injured; that among the injuries so caused her ankle bones were broken, her leg injured, her nervous system was incurably injured, and she was otherwise injured." Under these allegations it was competent to show any injury to plaintiff's person or health of which the derailment was the proximate cause. If alarmed by the peril apparently occasioned by the derailment, but acting as a person of ordinary prudence would in like circumstances in endeavoring to escape or avoid the same, she betook herself to the platform of the car and jumped or fell off, or was jolted off by the car's motion, or pushed or crowded off by fellow-passengers in the excitement of the moment, any injury to her health or person occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment as its primary proximate, responsible, and judicial cause. *Smith v. St. Paul, etc., R. R. Co.* 262.

2. In the circumstances mentioned the damages resulting directly and proximately to the person and health of plaintiff (considered simply as a person) from her fright and from her coming to the ground, whether by jumping or by any of the means before indicated, would be general, not special. General damages are not such only as must, *a priori*, inevitably and always result from a given wrong. *Id.*

3. It is enough if, in the particular instance, they do in fact result from the wrong directly and proximately, and without reference to the special character, condition, or circumstances of the person wronged. *Id.*

4. It is the duty of every railroad company to cause its passenger trains to stop at each station advertised as a place for receiving and discharging passengers, a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations, and it is the duty of passengers to exercise ordinary care for their safety in attempting to take passage on railway cars. *Wabash, etc., R. R. Co. v. Rector*, 264.

5. No degree of carelessness or negligence on the part of a passenger will excuse a wanton and malicious attack on him by the conductor or other servant of the railroad company. No matter how negligent a passenger may be for his safety, that will not warrant the infliction of a willful injury by a railroad employee. *Id.*

6. In an action for damages against a railway company, the proof showed that the plaintiff delayed getting upon the train until it had started and got under considerable speed, when he caught hold of the railing at the end of the rear car and stepped upon the bottom step, when he was swung round to the rear of the car, with his back toward it, and in an effort to recover himself swung back, and with his right hand took hold of the other guard rail, and while in that position, it was claimed he was wantonly and maliciously assaulted by the conductor. The court instructed the jury that if they believed, from the evidence, that plaintiff, under all the circumstances, in attempting to board the train acted as a reasonably prudent man would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by him resulting from the willful or wantonly malicious conduct of the servant of the defendant acting in the line of his duty, the defendant was liable for such injuries. *Held*, that while under some circumstances the principles of the instruction might be applicable, it was calculated to mislead the jury under the facts of the case tried. *Id.*

7. Where the plaintiff, in an action against a railroad company to recover for a permanent personal injury, including one to his spine, claimed to have resulted from an unjustifiable assault upon him by the conductor as he was attempting to board a car while in motion, the proof tending strongly to show that the principal injury, the one to his spine, was caused by a severe strain or wrenching of his body in attempting to get on the train, an instruction which ignores the fact that such injury might have resulted from his own imprudent act, should not be given. It should exclude from the jury all idea that there

PASSENGER—Continued.

could be any recovery for injuries sustained by the imprudent attempt to board the car while in motion. *Id.*

8. The W. Company by their original act were authorized to charge reasonable rates for the conveyance of passengers. By a subsequent Act the company were empowered to extend their line, and to charge a lump sum for carrying passengers over that extension. A third and later Act allowed the W. Company to amalgamate with another company, provided that they reduced their charges to the same scale as that of the other company. That scale was one penny a mile for each third-class passenger. The plaintiff travelled over the line of the W. Company with a third-class ticket, and was charged as his fare at more than the rate of one penny a mile. In the course of his journey he travelled over the extension. The W. Company also charged the company with the government duty. *Held*, that the W. Company were not entitled to charge the plaintiff more than one penny per mile, but that they were entitled to charge him with the government duty. *Brown v. Great Western R. R. Co.* 271.

9. By one of the clauses in an Act relating to the W. Company they were forbidden to take tolls, unless milestones were maintained along the line; and another Act relating to the W. Company incorporated the Railways Clauses Consolidation Act, 1845, which, in s. 95 contains a similar provision. *Held*, that the word "tolls" related to tolls properly so called, and did not extend to charges for carrying passengers in the company's own carriages. *Id.*

10. Where a passenger was wrongfully arrested on a train by order of the conductor, *held* that it was competent to prove that the latter was acting within the scope of his authority as conferred by the company, or under its instructions. *Galveston, etc., R. R. Co. v. Donahue*, 287.

11. It is the duty of a person about to take passage on a railway train to inform himself when, where and how he can go and stop, according to the regulations of the railway company, and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences. *Beauchamp v. International, etc., R. R. Co.* 307.

12. By his ticket the passenger on a railway train acquires the right only to be carried according to the custom of the road. He has the right to go to the place which his ticket calls for on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road. *Id.*

13. A free pass, containing an express release of the liability of a railroad company for all damages on account of injury to the person of the holder, although accepted and used, does not relieve the company from liability as a common carrier for negligence. *Buffalo, etc., R. R. Co. v. O'Hara*, 317.

14. One who accepts and uses a free pass issued by a railroad company, in violation of the Constitution of 1878 and the Act of June 15, 1874 (P. L. 389), does not thereby become a trespasser. *Id.*

15. It is not necessarily negligence to attempt to get on a train which had started from a station. The rate of speed and whether the train was stopped a sufficient length of time to enable passengers to get on, are circumstances to be considered in deciding the question. *Swigert v. Hannibal, etc., R. R. Co.* 323.

16. The fact that the conductor of a railroad train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start. *Id.*

17. Railroad trains are bound to stop at stations a reasonable length of time to enable passengers to get on. *Id.*

18. While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty certainly where he is in the wrong, to submit without resistance, except in defence against impending bodily injury; and, right or wrong,

PASSENGER—Continued.

necessary resistance will excuse the use of force and mitigate the damages for any injury received. *Hall v. Memphis, etc., R. R. Co.* 848.

19. A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket, it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of contract. *Id.*

20. A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place. *Id.*

21. What evidence is sufficient to sustain a verdict of damages against a railway company for failure and refusal to transfer a passenger upon application and tender of charges. *H. & T. C. R. R. Co. v. Rand*, 399.

22. The liability of the defendant railway company is measured by the fact that the injury received follows proximately from the culpable act complained of, and if erysipelas sprang from the injury, the dangers from that disease, as well as the sufferings produced by it, constitute a portion of the injury itself, and it is none the less so because under similar accidents producing fractures, that disease would not necessarily follow. The refusal of a charge opposing this principle *held* not to be error. The plaintiff's action being the direct and proximate cause of the injury, and it appearing from the facts proved that leaping from the cars while in motion is unsafe and dangerous, it follows that plaintiff contributed, by his want of care, to the casualty which occurred; that the fault of the defendant company in too speedily leaving the station did not endanger the personal safety of plaintiff, and its very nature could not be the proximate cause of the injury which the plaintiff received through his own direct act, which was the proximate cause of said injury. *Houston, etc., R. R. Co. v. Leslie*, 407.

23. A railroad company is liable for the act of its conductor in throwing a passenger from the car. *Schultz v. Third Ave. R. R. Co.* 412.

PENALTY.

1. A railroad company is not relieved of liability to the penalty of \$25 per day, under the act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient numbers of cars. *Keetor v. Wilmington, etc., R. R. Co.* 165.

2. By the words "five days," the act means five full running days, including Sunday whenever it intervenes. *Id.*

3. The company would not incur the penalty until the full expiration of the sixth day after receipt of the goods—the law not regarding the fraction of a day in the enforcement of a penal statute. *Id.*

4. Section 2 of the acts of North Carolina of 1874 and 1875, chap. 240, imposing a penalty upon railroad companies for allowing any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the company and the shipper, is a valid act. *Whitehead v. Wilmington, etc., R. R. Co.* 168.

5. Said act is not to be deemed unconstitutional on the ground that it contravenes the charters of railroad companies formerly granted, or because it may indirectly operate upon commerce outside of the immediate jurisdiction of the State. *Id.*

6. In an action to recover the penalty provided by the said act, the provisions thereof are to be construed strictly in favor of those charged with violating its provisions. The rigid rules of the common law with reference to the liability

PENALTY—Continued.

of common carriers should not be applied where in such case it appears that the delay in shipping the goods has been caused by circumstances which the railroad company could not have been expected to provide for, and which have occurred entirely without fault on the company's part, semble that it will be held excused from liability. *Id.*

7. A railroad company accustomed to transport cotton, owned 120 flat-cars, which were usually ample to carry on all its business in that line. In the autumn of 1881, the cotton crop was very heavy and there were many delays in consequence. At the same time, a connecting line over which much of the cotton was forwarded, gave notice that it would thereafter transport cotton only in box-cars and not in flat-cars. The company first above named had not sufficient box-cars to carry on its business and was wholly unable at once to obtain more. At this juncture, A. & Co. delivered certain cotton to the railroad for transportation, receiving a through bill of lading over the connecting line, which bill contained a clause providing that the cotton was received for transportation, "at the company's convenience." A. & Co., although well able to read, did not notice said clause until after the bringing of the suit hereinafter mentioned. The cotton was not shipped for more than five days, owing to the circumstances above mentioned, in a suit by A. & Co. against the railroad company to recover the statutory penalty.

Held, that under the circumstances of the case, the clause above cited in the bill of lading was a valid one, and might be taken advantage of by the company and that therefore plaintiffs could not recover. *Id.*

8. Section 4886 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than 28 consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., from a point within a state to another point therein, but only to such as carry swine, sheep, etc., from one state to another. *United States v. East Tenn., etc., R. R. Co.* 259.

9. An action under chapter 68, Acts Fifteenth General Assembly of Iowa, for five times the amount paid as freight, in case of an overcharge, is an action for a statutory penalty, and, under section 2529 Code, is barred in two years. *Herriemann v. Burlington, etc., Ry. Co.* 389.

PLEADING.

1. Plaintiff's complaint contained three counts: the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each "closing to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized. *Held*, untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. *Schultz v. Third Ave. R. R. Co.* 412.

2. It is no longer necessary to take advantage of the want of requisite citizenship by plea in abatement. *Rae & Grand Trunk R. R. Co.* 470.

3. Pleadings in justices' court are to be viewed with liberality; and where a declaration, though informal, fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to. *Wilcox v. Toledo, etc., R. R. Co.* 518.

4. Defect in pleading may be aided by pleading over. *Central, etc., R. R. Co. v. People*, 546.

POST OFFICE.

See MAILS.

PRACTICE.

1. Though, under the Revised Statutes (arts. 1215, 1219, 1220), the citation to a defendant should state, among other things, the nature of the plaintiff's demand, it was not designed to supply in this respect the place of the petition; a general statement notifying defendant of the character of plaintiff's demand, and avoiding any attempt at detail is sufficient. *Houston and T. C. R. R. Co. v. Burke*, 59.

2. In a suit against an incorporated company, citation may be served upon a local agent representing the company in the county in which such suit may be brought (R. S. 1223). A petition alleged that a defendant incorporated company had an office "for the transaction of business as a common carrier in the city of Austin, Travis County, Texas, at which place the agent of said company is Robert S. Collins." The suit was brought in Travis County. *Held*, that service of citation on Robert S. Collins was sufficient to hold the defendant to answer the petition, and that no judicial ascertainment of the agency was required to authorize a judgment by default. *Id.*

3. When service of citation is made upon the agent of an incorporated company who resides in the county where the suit is brought, the defendant company, though its principal office may be elsewhere, is not entitled to be served with a certified copy of the petition. *Id.*

4. See opinion for facts stated in motion and affidavits to set aside a judgment by default, which so far excused a failure to answer, that, if accompanied with a showing of a meritorious and valid defense, should have authorized the granting of the motion. *Id.*

5. A defendant against whom a judgment by default has been rendered cannot complain that plaintiff's claim for damages was excessive, if, after overruling his application to set aside the default, the court permitted the defendant to introduce evidence to show the true extent of damage sustained. *Id.*

6. Where a case is submitted upon an agreed statement of facts the parties waive any objection to the form of the pleadings not expressly reserved. *Forbes v. Fitchburg R. R. Co.* 80.

7. Where there is evidence to sustain a verdict the same is conclusive and will not be reviewed on appeal. *Wilson v. S. P. R. R. Co.* 161.

8. Where the record on appeal fails to show that an instruction was applicable to the evidence, the action of the court in refusing it will be sustained even if the reason given by the court for its refusal was not sufficient. *Mayor v. Virginia, etc., R. R. Co.* 178.

9. Instructions that are not pertinent to any issues in the case should be refused, although they embody correct propositions of law in the abstract. *Id.*

10. Plaintiff complained of an instruction given by the court of its own motion: *Held*, that even if it was erroneous it could have done no harm to plaintiff, because it was but a repetition, in substance, of one given at his request. *Id.*

11. Where there is evidence to support the finding of the jury as to damages, the court will not undertake to determine its credibility or relative weight. *Evansville, etc., R. R. Co. v. Montgomery*, 195.

12. When modifications to instructions are excepted to the bill of exceptions must show the modification, and what the instructions are, as amended; otherwise this court cannot tell whether they are right or wrong. *St. Louis, etc., R. R. Co. v. Hecht*, 222.

13. Where a motion is made on the day preceding the day of trial to suppress a deposition, and on the next day, but prior to the commencement of the trial, the motion is presented to the court for hearing, and the court refuses to entertain the same on the ground that it is made too late; *held*, error. *Adams Express Co. v. McConnell*, 240.

14. An instruction is vicious which ignores an important fact intimately connected with and affecting the plaintiff's right, or the extent of the defendant's liability, which the evidence tends to prove. *Wabash, etc., R. R. Co. v. Rector*, 264.

15. It is not sufficient, in such a case, that some of the defendant's instructions

PRACTICE—Continued.

may have stated the law correctly on such branch of the case. The plaintiff's instructions should have done the same thing, so that the jury might not be misled by considering one set or the other of the charges given. *Id.*

16. The citation in a suit against an incorporated railway company described the company as a railroad company. *Held*, that there was no error in overruling a motion to quash the service. *Galveston, etc., R. R. Co. v. Donahoe*, 267.

17. The Supreme Court will not grant a new trial on the ground of surprise when it was the result of misapprehension by the counsel of the law of the case. *Beauchamp v. International, etc., R. R. Co.* 307.

18. Instructions offered by the parties but amended by the court before being given are to be considered as if given by the court of its own motion, and the fact that counsel read them to the jury will not operate a waiver of exceptions duly taken to the action of the court. *Swigert v. Hannibal, etc., R. R. Co.* 322.

19. Instructions so drawn as to put upon the plaintiff the onus of showing that he was not guilty of contributory negligence are properly refused. *Id.*

20. A verdict will not be set aside unless the damages are very clearly excessive. *H. & T. C. R. R. Co. v. Boehm*, 366.

21. A new trial will not be granted on the ground of newly discovered testimony, the only effect of which is to impeach the credibility of a witness. *Moore v. Chicago, etc., R. R. Co.* 401.

22. The law again announced that a judgment in a civil cause will not be reversed for a mere failure on the part of the court below to cover in the charge every phase of the case, when attention is not called to the omission by a charge asked or otherwise. *Van Alstyne v. Houston, etc., R. R. Co.* 447.

23. Generally exceptions to the reports of master commissioners partake of the nature of special demurrers; and if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence on which they are founded. *Chapman v. Pittsburg, etc., R. R. Co.* 484.

24. Where three suits are consolidated, and there are attachments in each, and the defendant, a non-resident corporation, appears in the suits, and a personal decree is rendered against it, but in one of the suits the trustees holding the legal title are not before the court, and the court as to that suit declines to make an order of sale as to the attached property, but remands it to rules to bring in the trustees holding the legal title, and in this state of the case an appeal is taken from the decree in the consolidated suits, this court will not consider any alleged errors in such attachment, because its validity had not been passed upon by the circuit court. *Id.*

25. Where the bill makes reference to the important exhibits and bases allegations thereon, and the defendant answers and does not deny the existence of the exhibits nor contest their validity, and they are not produced, the defendant can make no objection in the appellate court to their non-production. *Id.*

26. Where an attachment is sued out against a non-resident corporation, which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such non-resident corporation, which appears in the cause; but the attached property will not be sold in the absence of trustees, who hold the legal title; they must either be served with process; or, if non residents, an order of publication must issue against them and be duly published. *Id.*

27. Where the evidence fully sustains the verdict, the judgment of the court below must be affirmed; and newly discovered evidence, which is merely cumulative, will not entitle the party to a new trial. *Hickinbottom v. Chicago, etc., R. R. Co.* 606.

28. How far equitable relief will be afforded in action brought in common law court. *Little Rock, etc., R. R. Co. v. Perry*, 610.

29. It is the province of the court to determine, when evidence is offered, whether it tends to prove the issue. After it has gone to the jury, unless

PRACTICE—Continued.

wholly irrelevant, it is for the jury to determine how far it, with other circumstances, conduces to prove the issue. *Id.*

30. If there is any evidence whatever, however slight, pertinent to the issue, the court should not take it from the jury and direct their verdict, even if it is satisfied that it would grant a new trial if a verdict should be found upon it. *Id.*

31. The jury can find for the party holding the affirmative of the issue, only when there is a preponderance of testimony in his favor. The degree of preponderance is immaterial, but there must be some, of which they are the judges. *Id.*

32. When a suit is upon an aggregate account filed as an exhibit, it is no surprise to the defendant to introduce and prove the bill of items composing the aggregate, though not filed as an exhibit. *Id.*

33. A judgment in solido, upon two counts, will be reversed in toto, if erroneous as to one. *Id.*

34. A party who has tried his case upon a theory involving the tacit concession of a particular fact, will not be permitted in the appellate court to obtain a reversal of the judgment against him upon a theory involving a denial of that fact. *Bray's Adm'r v. Seligmann's Adm'r*, 653.

35. It is a settled rule that the decision of an appellate court upon any question or questions actually in judgment and properly before it for decision, is binding in all the subsequent stages of the cause. This rule does not, however apply to matters stated by the appellate court merely by way of illustration or argument. *Richmond Street R'y Co. v. Reed*, 697.

36. Appeal from a decree rendered in term time dismissed—a copy of the exceptions not having been furnished to the trial judge within ten days after the rising of the court. *In re 54 First Mortgage Bonds*, 739.

PREFERRED STOCK, 558, 681, 689.

See **STOCK AND STOCKHOLDERS**, 2, 5, 7, 8, 9.

PROMOTERS.

1. Whenever a third party enters into a contract with the promoters of a railroad, which is intended to inure to the benefit of the company, and it takes the benefit of the contract, it will be bound to perform it. *Little Rock, etc., R. R. Co. v. Perry*, 610.

2. In order to recover against a corporation in an action at law for services rendered before its being, the plaintiff must prove either an express promise of the new company, or that the contract was made with persons then engaged in its promotion and taking preliminary steps thereto, and was made on behalf of the new company in the expectation of the plaintiff, and with the assurance of the projectors, that it would become a corporate debt; and that the company afterward entered upon and enjoyed the benefit of the contract and by no other title than that derived through it. *Id.*

3. A verbal promise of a corporation to pay a party's claim, contracted with other parties prior to the incorporation, is void by the statute of frauds, as an undertaking to pay the debt of a third person. *Id.*

PROXIMATE AND REMOTE CAUSE, 407.

See **PASSENGER**, 22.

QUO WARRANTO, 433.

See **OFFICER**.

The writ no longer exists in Colorado. Nature of the substituted remedy and proceedings thereunder. *Central, etc., R. R. Co. v. People*, 546.

RATES OF FREIGHT, 13, 21, 25, 123, 201, 242, 271, 339, 385, 479.

See **CARRIERS**, 39, 46, 47, 57; **CONNECTING LINES**, 4, 5, 6, 10; **CONSTITUTIONAL LAW**, 10; **DISCRIMINATION**; **PASSENGER**, 8; **PENALTY**, 9.

RECEIVER, 585

See JURISDICTION, 9.

1. The receiver of a railroad corporation has no power, without the authority of the Chancellor, to make a contract which will bind the trust. *Lehigh Coal & Nav. Co. v. Central R. R. Co. of N. J.* 479.

2. All contracts made by the receiver of a railroad corporation are subject to the control of the Chancellor, and he may modify them, or disregard them entirely, as to him may seem best. *Id.*

3. The funds in the hands of a receiver of a railroad, appointed in a suit to foreclose a mortgage executed by the company, must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors. *Addison v. Lewis*, 702.

4. These rules are subject to this modification, however: the net earnings, while the road is in the possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. *Id.*

5. These claims are confined to outstanding debts for labor, supplies, equipments or permanent improvements of the mortgaged property, as may under the circumstances of the particular case appear to be reasonable. *Id.*

6. When a Court of Chancery is asked by railroad mortgagees to appoint a receiver, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of issuing the necessary order, impose such terms, in reference to the payment from the income, during the receivership, of outstanding debts from labor, supplies, equipments or permanent improvements of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of cause, if required in the due administration of justice and the enforcement of the equities of the respective parties. *Id.*

7. When the current earnings of a railroad, which ought, in equity, to have been employed to pay current debts contracted before the receiver's appointment, for labor, supplies and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has been thus improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands, before anything derived from that source goes to the mortgage creditors. *Id.*

8. This doctrine of restoration of the funds rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are, in a sense, trustees of these earnings for the benefit of the different claims of creditors, and if they give to one class of creditors that which properly belonged to another, the court may, upon an adjustment of accounts, so use the income in its hands as to restore, if practicable, the parties to their original rights. *Id.*

9. The claims of the general creditors can never take priority over the mortgage creditors, except when it is shown that such general creditor has, upon the principles of courts of equity, a superior equity to the lien creditor. No general rule can be laid down on the subject, but each claim must be determined upon the particular facts showing the peculiar equity. *Id.*

10. Pending action to subject a railroad to sale for the payment of its mortgage debts, the president and directors of the company were ordered to continue in the possession and management of its property of all kinds under the order of and subject to the court; and such officers were in like manner to continue to conduct and carry on the business of the company and to make report to the court, when required, of the condition of the property of the company, of its earnings and expenditures, to the end that such orders might be moved for as were necessary for the protection of the property of the company and the interests of all parties concerned. *Held*, that by this order the president and directors, and their successors in office, were constituted receivers of the court. *Ex parte v. Brown*, 723.

11. A change of incumbent in the office of railroad receiver does not affect

RECEIVER—Continued.

the status of claims against the property arising during the receivership. *Id.*

12. Passengers over a railroad and an employee of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought. *Id.*

13. Under action pending in the name of the state for the foreclosure of a mortgage upon the property of a railroad corporation, and the appointment of a receiver, and on the motion of the Attorney-General for such appointment, an order was passed by the court in the words following: "As the state cannot be required to give security as other plaintiffs, it is ordered, that the president and directors of the Greenville and Columbia Railroad Company, under the order of and subject to this court, continue in the possession and management of the property of all kinds of the said company; and in like manner continue to conduct and carry on the business of the said company; that they make report to this court, at such times as this court may require, of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation." *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business, as officers of the court and not of the company. *In re 54 First Mortgage Bonds*, 789.

REMOVAL OF CAUSES, 496.

See JURISDICTION, 8, 4, 5.

REORGANIZATION, 448, 454, 518.

See ASSIGNMENT; CORPORATION, 4; FORECLOSURE.

1. One of the largest bondholders in a railroad company, *held*, under the circumstances of the case, to be bound by a plan for the reorganization of the company after a foreclosure sale. *Matthews v. Murchison*, 698.

2. Said bondholder having received without objection her portion of bonds in the new company and offered part or the whole of them for sale, *held*, that she was estopped from denying the valid and binding nature of the agreement for reorganization. *Id.*

REPLEVIN, 252.

See BILL OF LADING, 6.

RESCISSION, 242.

See CONTRACT, 4.

RULES AND REGULATIONS.

1. A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable and such as do not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel. *Summit v. State*, 802.

2. A regulation forbidding hackmen, peddlers, expressmen and loafers from coming within the passenger depot is reasonable. *Id.*

SCALPING TICKETS, 291.

See TICKETS, 2.

SEAL.

Where an appeal bond purporting to have been executed in the name of a railroad company by its general attorney, has the seal of the corporation attached, the presumption will arise that the person using the seal had authority to do so. *Indianapolis, etc., R. R. Co. v. Morganston*, 469.

SERVICE OF PROCESS, 59, 287.See **AGENT, 2; PRACTICE, 16.****SIDEWALKS, 127.**See **MUNICIPALITY, 1.****SLEEPING CARS.**

1. Sleeping-car companies are bound to exercise ordinary care for the security of passengers' valuables. *Woodruff Sleeping and Parlor Coach Co. v. Diche*, 294.

2. A passenger in a sleeping-car upon retiring for the night placed his vest containing his watch and a considerable sum of money under his pillow. Three other sleeping cars were coupled to the one in question, and during a great part of the night were all under the charge of one conductor. Each car had a porter, who had, however, duties to perform inconsistent with watching over the sleeping passengers. For a part of the night the porter attached to the car in question was absent. When the passenger awoke in the morning he found his vest and the contents thereof gone. In an action by him against the sleeping-car company to recover the value of these articles, *held*, that the company had not taken reasonable precautions to guard the plaintiff's property, and that therefore he was entitled to recover. *Id.*

3. Semble, that sleeping-car companies are not liable either as innkeepers or common carriers for personal goods stolen from the person of an occupant of a berth in a sleeping-car. *Id.*

STATUTE, 454, 525.See **CHARTER, 2, 3, 4, 5, 6, 7; CONSTITUTIONAL LAW, 6, 7, 11.**

1. The statute law of another state must be proved like any other fact. In the absence of evidence the presumption is that the common law obtains in another state. *Eicherburger v. Pittsburg, etc., Ry. Co.* 158.

2. The provisions of the Railroad Act of 1850 (Chap. 140, Laws of 1850) were not rendered inoperative as to railroads running "over, under, through or across streets, by the Rapid Transit Act, so called (Chap. 606, Laws of 1875), as by the latter act it is declared that it "shall not be construed to repeal or in any manner to affect" the former. *New York v. Brooklyn, etc., R. R. Co.* 454.

3. At the time of the passage of the act of 1859 (Chap. 484, Laws of 1859), providing, among other things, for the relinquishment by the L. I. Co. of the right to use steam power within the city of Brooklyn. It was rightfully running its trains by steam through Atlantic avenue. In pursuance of that act it relinquished such right in consideration of a payment made to it, which was assessed upon property benefited, and the road was thereafter operated by horse power until 1876, when the common council of said city passed a resolution, authorizing the use of steam in drawing cars on said avenue, and the legislature passed an act (Chap. 187, Laws of 1876) authorizing such use by the L. I. Co., and immediately thereafter the use of steam power was resumed. In 1879 defendant under its contract ran its cars on the avenue in the same way. *Held*, that the act of 1876 removed the restriction, leaving the original charter power of the L. I. Co. in full force; that it had the right to determine what motive power should be used, both as to its own cars, and as to others which it could lawfully permit to come upon its road; and as, by its lease to defendant, the latter was authorized to use steam power, it could lawfully use it to run its cars on the avenue.

4. Under the constitution of Colorado, so much of an act as is not expressly germane to the subject expressed in the title is without force. *Central R. R. Co. v. People*, 546.

STOCK AND STOCKHOLDERS.

1. On the purchase of a railway company and its franchises under execution, the purchasers by circular-letter offered to the old stockholders the privilege of participating on equal terms in the purchase, on payment of ten per cent cash on their full paid-up stock within a specified time. Subsequently an act of the legislature released the road from forfeiture on condition that the company

STOCK AND STOCKHOLDERS—Continued.

should restore the original stockholders who had paid for stock to all the rights they were divested of by the sale; provided that if said stockholders failed to pay ten per cent on the amount of their stock within a time specified in the act they should forfeit all rights under it. A stockholder paid in the ten per cent, on the amount of original stock which had been owned by him, but after the expiration of the time limited for its payment by the circular-letter and the legislative act. Watered stock, under a general resolution of the company, was issued to him, eight shares of watered stock for one of old stock actually paid up, but he received no additional new stock to cover the ten per cent, paid under circular-letter and legislative requirement. In a suit to compel the issuance of stock to cover the ten per cent paid, *held*, that having paid up the ten per cent after the time limited by the circular-letter and legislative enactment, and received new stock in lieu of his original stock, he was not entitled to recover. *Van Alstyne v. Houston, etc.*, R. R. Co. 447.

2. Where stock is issued and accepted as preferred stock on which interest is payable, *held*, that the holders thereof, and their assigns, having accepted it, and received interest on it for several years, are estopped from questioning the power of the company to issue such preferred stock. *Branch v. Jesup*, 558.

3. Right of single stockholder to restrain by injunction ultra vires and unlawful act on the part of a corporation. *Elkins v. Camden, etc.*, R. R. Co. 590.

4. The terms "stock" and "capital stock" considered, and held, that stock when used in reference to corporations, and in connection with the privilege of subscribing thereto, means capital stock. *State ex rel. v. Cheraw, etc.*, R. R. Co. 631.

5. An act of the legislature authorized the issue of bonds by a county "in subscription for preferred stock" of a railroad company, and the act provided that the county "shall receive from the company preferred stock to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent per annum." *Held*, that this preferred stock meant capital stock, different from other capital stock only in the preference given to it in the matter of dividends. *Id.*

6. A certificate of stock tendered by the company to the county setting forth that the county was entitled to the stated amount, but impliedly declaring it not to be capital stock, was not sufficient; and there was no error in a writ of mandamus prescribing a form of certificate in substantial compliance with the terms of the act. *Id.*

7. A demand by the county made upon the railroad company for certificates of preferred stock, although the demand did not specify the precise character of the certificates, was sufficiently definite to warrant this subsequent proceeding by mandamus. *Id.*

8. After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued, . . . the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years, dividends of seven per cent or less were declared on the preferred stock alone, and in other years such dividends were declared on both the preferred and common stock. *Held*, that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits, but when such profits had been earned, he was entitled to a dividend of seven per cent therefrom, before any dividend could be paid on the common stock. *Elkins v. Camden, etc.*, R. R. Co. 689.

9. The silence or failure of a former owner of such preferred stock to object to the declaring of any dividends on the common stock until after he had been paid seven per cent on his own, will not estop the present owner thereof from asserting his claim to re-imbursement to that extent out of the future profits. *Id.*

10. One S. purchased and paid for thirty shares of defendant's stock, directing the treasurer at the time to set it aside in the name of Y., plaintiff's testator, and that he (S.) would let him know whether to deliver it to Y. and what to do with

STOCK AND STOCKHOLDERS—Continued.

it at some future time. The treasurer issued a receipt stating that he had received the purchase-price from Y., which receipt came into the possession of the latter, in what way it did not appear; Y. had married a niece of S., lived in his family, and had adopted a child in whom S. took a special interest. Afterward S. told Y. that he could make the shares but twenty-seven, and as the receipt had been made out to him he would want an order for the three shares. Y. thereupon gave an order directing the company to transfer three shares of the stock then held by him, as S. might direct. No certificate of the stock was ever issued. When a dividend had been declared thereon, S. directed Y. to go to the office for it, that he had had the dividends made out in his name, and they would support or help support the child, and the dividends were paid to Y. by the direction of S. until the death of Y. After the stock had been thus placed in the name of Y., his wife died; he married again, and his second wife ceased to care for the child. In an action to compel defendant to issue to plaintiff a certificate of the stock, *held*, that there was no valid gift of the stock, as it was clearly not the intent of S. to vest the title in Y. for himself but to create a trust for the benefit of the child, nor was it his intent that Y. should control the stock.

Also *held*, that this defense was available to defendant. *Jackson v. Twenty-third St. R. R. Co.* 648.

11. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually as a stockholder, on motion of a creditor of the corporation, wherever the firm would be subject to such liability. *Bray's Adm'r v. Seligman's Adm'r*, 653.

12. By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same and liable; and the estates and funds in the hands of executors, etc., shall be liable. *Held*, that persons to whom stock of a corporation is pledged as collateral security by the corporation itself are within the exemption of the statute. *Burgess v. Seligman et al. Executors*, 655. That certificates of the stock, absolute on their face, issued to a creditor as collateral security, or in trust, may be shown to be so held by evidence in pais. *Id.*

13. That the holder of such stock as collateral security, or in trust, though he vote on such stock, is not thereby estopped from showing that the stock belongs to the company and not to him, and that he only holds it as collateral security. *Id.*

14. To sustain a claim of a right by contract to vote stock in a corporation without increasing the obligations of a stockholder, it must appear that at the time the stock was voted there was a contract in force authorizing the holder to vote it. Hence, where a corporation deposited its own unpaid and unsubscribed stock with a banking firm as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock, and after the lapse of the year the firm did vote it and thereby elected their own board of directors and so ultimately obtained complete control of the corporation; *held*, that they thereby brought themselves within the rule of liability. *Fisher v. Seligman*, 670.

15. One who would be estopped to deny, as against a corporation, that he is a stockholder thereof, will also be held estopped as against a judgment creditor of the corporation. *Id.*

16. No person will be regarded as holding stock as a "trustee" or by way of "collateral security," within the meaning of section 9, *Wagner's Statutes*, page 301, and, therefore, exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business. *Id.*

17. Courts will be sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges

STOCK AND STOCKHOLDERS—Continued.

incident to the position of a stockholder and at the same time to be exonerated from the burdens imposed by law. *Id.*

18. After a sale of stock in a railroad company by the owner to whom the certificate had issued, the sale being evidenced by assignment and delivery of the certificate, and after the purchaser had surrendered said certificate to the company and received in lieu thereof a certificate in his own name, the transaction being properly evidenced on the books of the corporation, the original certificate and the rights of the original owner were extinguished, so that a subsequent assignment of said stock by said original owner to another party would pass no right or title thereto. *Houston, etc., R. R. Co. v. Van Alstyne, 686.*

19. If by mistake a new certificate of stock has also issued to the second assignee, he not being a purchaser for value and without notice, will not be entitled to the rights of an owner of stock. *Id.*

20. It seems that this is so, although the first purchaser was the secretary of the company, and as such by mistake issued the certificate to the second assignee. *Id.*

21. The second assignee, being a director of the company and in a position to know its affairs, cannot avail himself of the mistake. *Id.*

22. The railroad company had resolved to increase its stock eight-fold by substituting for the original certificates new certificates on the basis of eight for one; *held*, that a suit by the second assignee to enforce his right to these new certificates was substantially a suit for special performance. *Id.*

23. Under the law of California no assessment can be levied on fully paid-up stock. *Santa Cruz R. R. Co. v. Spreckles, 679.*

STOPPAGE IN TRANSITU.

1. In the absence of evidence showing that a railroad company had a general freight agent at the point in question, notice of stoppage of goods in transitu given to a station agent at the point of destination is sufficient notice to the company. *Poole v. Houston, etc., R. R. Co. 197.*

2. F., a merchant at Dardanelle, ordered goods of W. B. & Co., merchants at St. Louis. They sent the order to L. A. & Co., merchants at New Orleans, with directions to ship the goods to F. at Dardanelle, and send them the bill and bill of lading. L. A. & Co. filled the order, shipped the goods to F., and sent the bill and bill of lading to W. B. & Co., and charged the goods to them, and they charged them to F. During the transit W. B. & Co. failed, and L. A. & Co., claiming the right of stoppage in transitu, demanded the goods of the M. & L. R. R. Co., who were transporting them to F., and the company delivered them up to them. F. then sued the company for the value of the goods. *Held*, that L. A. & Co. were not the vendors of F.; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to F. for their value. *Memphis, etc., R. R. Co. v. Freed, 212.*

3. Upon the consignment of goods the title becomes vested in the consignee, absolutely and against all the world, subject only to the carrier's lien for freight, and the consignor's right of stoppage in transitu upon the consignee's insolvency. *Id.*

SUBSCRIPTION.

1. A promissory note, payable to the treasurer of the Chicago and Canada Southern Railway Company, was made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of passenger and freight depot" at Dundee; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond Dundee, so as to form a through line. *Held*, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built,

SUBSCRIPTION—Continued.

regardless of the failure to extend it to Chicago within three years, as stipulated. *Stowell v. Stowell*, 598.

2. In an action upon a subscription in the form of a note, to aid in the construction of a railroad, it was competent for the defendant to show by the subscription papers and by the declarations of the agent who procured the note, that the railroad was to be built between certain points. The leasing of a part of the road between two points is not a compliance with the contract to construct a road between said points. *Lawrence v. Smith*, 604.

3. Where suit is brought to recover a subscription to a railroad company, made before the organization of the company, it is necessary to a recovery that the complaint should show that the steps essential to bring the corporation into existence were duly taken. *Richmond Street R. Co. v. Reed*, 697.

4. In such case it is also necessary under the provisions of the Rev. Stat. of the State of Indiana, § 4148, to show that the contract of subscription contained inter alia a specification of the number of the directors of the proposed corporation. *Id.*

5. Where one subscribes a paper which in express terms professes to constitute articles of association, and contains provisions showing that to be the character its subscribers intend it to bear, it cannot afterwards, without the consent of the subscribers, be transformed into a more preliminary agreement. *Id.*

6. Where such articles contain a clause providing that when the full amount of the capital stock is subscribed any two of the subscribers may call a meeting for the purpose of effecting an organization and incorporation, and for electing directors, at which meeting any three or more subscribers may proceed to organize, as aforesaid, this will not be construed to constitute a delegation of authority by any subscriber to increase the capital stock, increase his own liability, or in any other way to change the effect and character of the original contract of subscription. *Id.*

TAX.

1. Where a foreclosure suit was brought, and the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon, *held*, that the order of the circuit court rejecting such claim is binding upon the corporation, and where the amount of taxes is sufficient to give this court jurisdiction the corporation is entitled to an appeal. *City of Savannah v. Jesup*, 573.

2. Certain taxes assessed by the City of Savannah, for the years 1877 and 1878, upon lands situate within its limits, and belonging to the Atlantic and Gulf R. R. Co., *held* to be unauthorized by law. *Id.*

3. If a party pays taxes on land which belongs to another, under the mistaken belief of ownership, a court of equity will not grant him any relief by which he may be reimbursed the sum paid. *St. Louis, etc., R. R. Co. v. Mather*, 600.

TELEGRAPH, 476,

See INJUNCTION, 1.

TERMINUS.

By defendant's charter, its terminus in Brooklyn was "at or near Atlantic avenue," its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. It acquired the right to run its cars upon the tracks of L. I. Co., whose road was constructed along the center of the avenue, and tracks were constructed by the L. I. Co. connecting those of the two roads; similar curved tracks had long been used by the L. I. Company to reach its depot south of the avenue and for other purposes. The L. I. Co. by its charter had the right to build such appendages as it deemed necessary, and branches when land was offered without expense. *Held*, that by defendant's charter its terminus was not necessarily south of the avenue, and there was nothing therein to prevent it from making such terminus in the center thereof, where it could connect with the other road; that the connecting tracks were authorized by the charters of the two companies, and the provision of the act of 1850 (§ 28, subd. 6), authorizing railroad companies to connect their roads, and

TERMINUS—Continued.

in no respect could they be considered as a separate and independent line, and so requiring all the steps necessary to a newly-organized street railway. *New York v. Brooklyn, etc., R. R. Co.* 454.

TICKET, 307, 348.

See **PASSENGER, 12, 19.**

1. The purchase of a ticket by a person on a company's railway, between two stations, creates the relation of carrier and passenger between them, with all the duties the law imposes on each. *Wabash, etc., R. R. Co. v. Rector*, 264.

2. Where a person purchases a railroad ticket from a dealer outside the limits of this state who is not an authorized agent of the company, he may maintain an action in the courts of this state against the company for a refusal to carry him on said ticket, notwithstanding the provisions of the Act of May 6, 1868 (P. L. 582), making it unlawful for an unauthorized party to sell railroad tickets in this Commonwealth. *Sleeper v. Penna. R. R. Co.* 291.

3. A regulation of a railroad company providing for the sale of tickets at a reduced rate, upon condition that they be used only by the persons purchasing the same, is reasonable and proper, and a third party cannot, by purchasing such ticket, acquire the right to travel on the same. A party holding such ticket, who refused to pay his fare and was expelled from the cars, cannot recover damages therefor. *Post v. Chicago, etc., R. R. Co.* 345.

4. Where a non-transferable ticket contained a condition that "I failing to comply with this agreement, either of these companies may refuse to accept this ticket," *held*, that this did not give the conductor the right to take it up, but merely to refuse to receive it. *Id.*

5. The measure of damages in such case would not exceed the value of a ticket of the same class between the points named. *Id.*

6. A passenger holding a ticket the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination. *Hall v. Memphis, etc., R. R. Co.* 348.

TIME-TABLE.

The time-table of a railway company, which on its face announces that it is for the government and information of employees only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping the train at a place mentioned in the time-table, but at which no station was ever really established. *Beauchamp v. International, etc., R. R. Co.* 307.

TOLLS, 271.

See **PASSENGER, 9.**

A toll road company organized under the incorporation act of Colorado of 1864 (Laws 1864, p. 66, § 28) may not establish and collect tolls at two gates distant less than ten miles from each other. *Central etc., R. R. Co. v. People.* 546.

TROVER, 76.

See **BILL OF LADING, 1; CARRIER, 16; DAMAGES, 4.**

Where ties were taken and used by the sub-contractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become really, cannot bring trover against the company as for their conversion. *Detroit, etc., R. R. Co. v. Busch*, 151.

TRUSTEE PROCESS.

See GARNISHMENT.

ULTRA VIRES.

1. The South Georgia and Florida R. R. Co., having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany and Gulf R. R. Co. to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany and Gulf R. R. Co. *Held*, that this contract was not ultra vires. *Branch v. Jesup*, 558.

2. The Albany and Gulf R. R. Co. had the same general power, except that of incorporating its stock with that of other companies, and had the right under its charter also to construct a railroad from Thomasville to Georgia. *Held*, that it was not acting ultra vires to make the purchase of said road and franchises as above stated, and to pay for the same by issuing its own stock therefor, which was delivered to and accepted by the contractors in lieu of the stock of the South Georgia and Florida R. R. Co., which latter stock they had subscribed for and agreed to take in payment for the work of construction. *Id.*

3. A resolution of the directors of a railroad company to assume certain debts and to buy a majority of the stock, bonds, and equipment of a rival railroad is ultra vires, and incapable of ratification by the stockholders. *Elkins v. Camden, etc.*, R. R. Co. 590.

4. The state only can take advantage of the incapacity of a corporation under its charter to purchase and hold the stock of another corporation. *Matthews v. Murchison*, 693.

WAGES, 158.

See EXEMPTION LAW, 1.

WHARVES, 144.

See CONTRACT, 2.

WAREHOUSEMEN, 419.

See CARRIERS, 62.

1. In an action for damages against a railway company to recover the value of goods lost by the alleged negligence of the defendant, it appeared that after the arrival of the goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days; notice of their arrival was given the plaintiff, who paid the freight charges with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen for that purpose, and in the afternoon of the second day they were destroyed by fire, together with much of defendant's property. *Held*,

There was a delivery in law of the goods to the plaintiff consignee, which exonerated the defendant company from liability as warehousemen. *Chalk v. Charlotte, etc.*, R. R. Co. 106.

2. The fact that the fire originated in a steam cotton compress, erected on the company's premises with its permission but not under its control, does not constitute negligence in the defendant, the permission to erect the same not being the proximate cause of the injury sustained by the plaintiff. *Id.*

3. In an action against a warehouseman proof of demand and refusal to deliver property stored with him constitutes prima facie evidence of negligence. If it appears, however, that the property, when demanded, was consumed by fire, the burden of proof is on the bailor to show that the fire resulted from some negligence or want of care on the part of the warehouseman. *Wilson v. S. P. R. R. Co.* 161.

4. Direct and positive evidence of negligence as a fact is not in such case required, any circumstances which tend to prove it or from which it may be reasonably inferred are sufficient. *Id.*

5. In an action for negligence it is error for the court to award a nonsuit unless

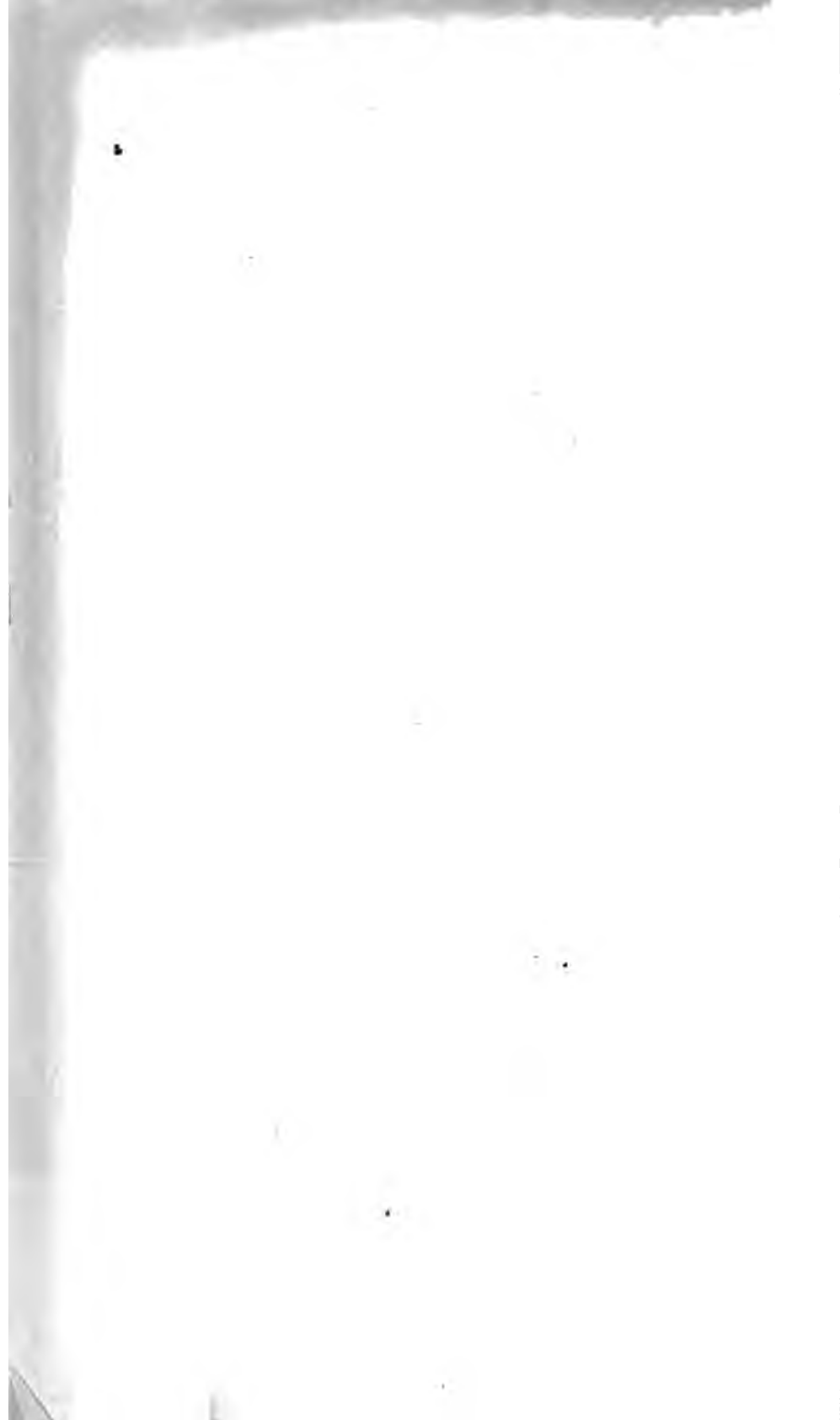
WAREHOUSEMEN—Continued.

there is no evidence at all of the negligence, or a mere scintilla, wholly insufficient for the consideration of the jury, or unless the facts are agreed upon or admitted and in the judgment of the court are insufficient to constitute a cause of action. *Id.*

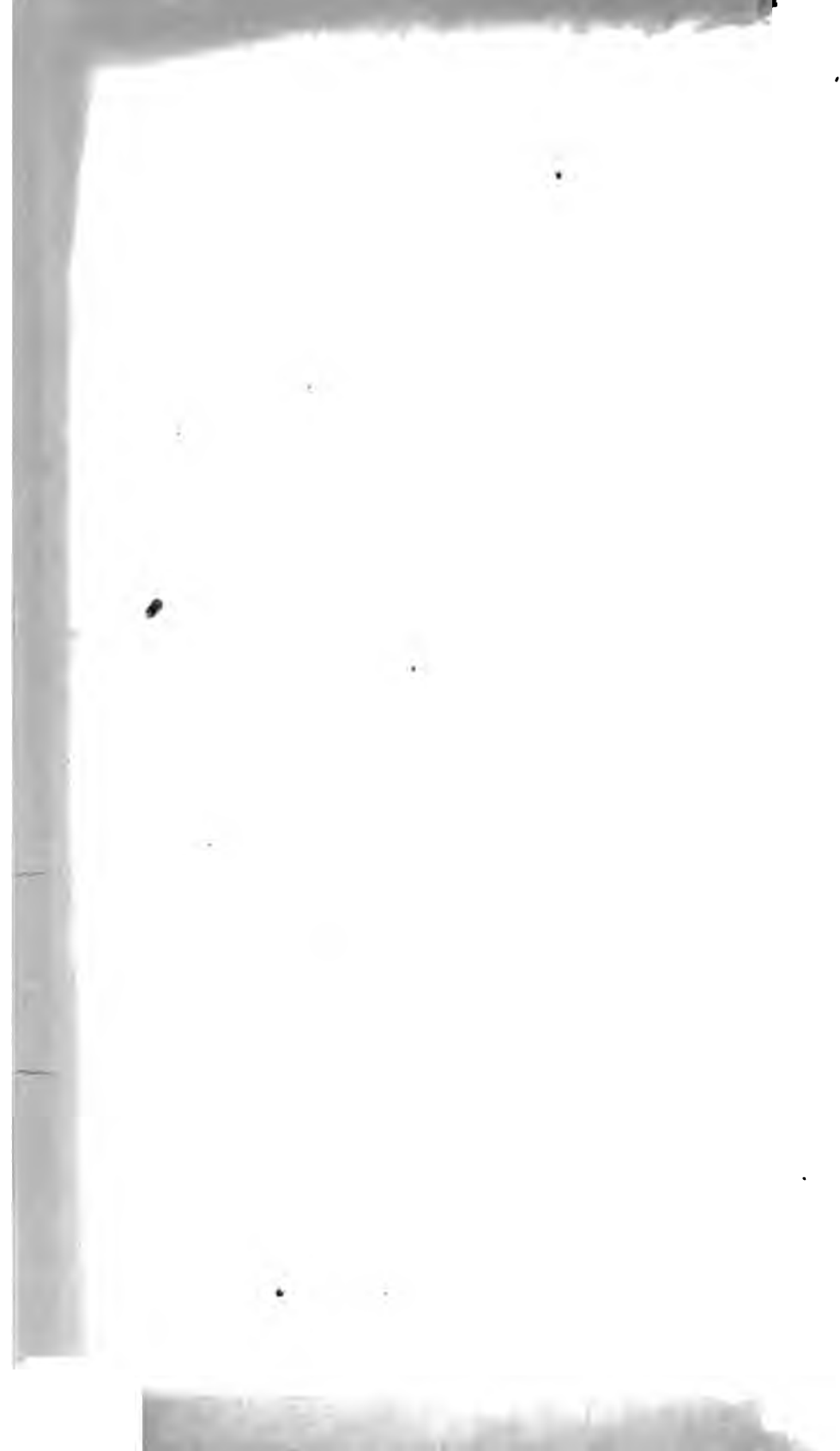
6. In an action against a railroad company to recover damages for the loss of certain bales of wool destroyed by fire while in the defendant's warehouse, plaintiff proved that in the evening the warehouse-keeper took a lamp into a small wooden room adjoining the office, made his toilet, and afterwards took the lamp with him into the warehouse, blew it out and locked the place up. Soon after the fire in question took place, originating near the spot where the lamp had been left. *Held*, that there was evidence to go to the jury that the fire had been occasioned by the careless or negligent use or extinguishment of the lamp.

7. It was not error in the above case to refuse to strike out that clause of the complaint which alleged that defendant owned and operated a railroad. There was nothing in this to irritate or excite the prejudices of the jury against the defendant. *Id.*

8. The duty of a carrier is to carry freight to the place directed, and if the consignee is not there to receive it, to store it for him. Upon the storage of the freight the carrier is liable as a warehouseman only. *Butler v. East Tennessee, etc., R. R. Co.* 249.







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